

TC 96-107

INVEST
COMMUNICATIONS

125 South Dakota Avenue, 8th Floor
Sioux Falls, South Dakota 57194

January 6, 1997

RECEIVED

Mr. Bill Bullard, Executive Director
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

Dear Bill:

In a telephone conversation on December 19, 1996 you asked me what the U S WEST strategy would be for the switched access docket, TC96-107, in response to the Commission's decision to re-open the record.

As I indicated to you then, U S WEST will cooperate with Staff to provide whatever additional information the Commission may want. We will also participate in any scheduled hearing to answer questions the Commissioners may have. However, the latest order dated December 12, 1996 re-opening the record says nothing about what the Commission expects from U S WEST or any other party at a new hearing. It has been over six months since we filed our access cost study as required by Commission rules, later answered data requests from intervenors, and presented witnesses to support that study in a hearing before the Commission. I am concerned about further delays in this decision.

Although I understand the Commission has scheduled further hearings in this docket for March, 1997, I would ask that the Commission conduct its schedule in an expedited fashion and approve the U S WEST access cost study and rates before January 28, 1997. As I further indicated in my telephone conversation, it is U S WEST's intent to implement the new rates on January 28, 1997 as allowed by state statutes (180 days after the August 1, 1996 filed effective date) if the Commission has not made their decision by that time.

Sincerely,



Jon Lehner
Director-Regulatory Affairs

CC: Dakota Coop
MCI
AT&T
TAG
Sprint

1247

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT)	ORDER FOR AND NOTICE
OF SWITCHED ACCESS RATES FOR U S)	OF PROCEDURAL
WEST COMMUNICATIONS, INC.)	SCHEDULE ON
)	CONTINUATION OF
)	HEARING
)	TC96-107

On June 24, 1996, U S WEST Communications, Inc. (U S WEST) filed for approval by the Public Utilities Commission (Commission) its 1995 switched access cost study. According to the application, the study develops an overall average calculated rate of \$0.066 per minute required to recover the costs.

On June 27, 1996, the Commission electronically transmitted notice of the filing and the intervention deadline of July 12, 1996, to interested individuals and entities. The following companies were granted intervention on July 30, 1996: Sprint Communications Company L.P. (Sprint); MCI Telecommunications Corporation (MCI); Express Communications, Inc. (Express); AT&T Communications of the Midwest, Inc. (AT&T); Telecommunications Action Group (TAG) and Dakota Cooperative Telecommunications, Inc. (DCT). The Commission also found that pursuant to SDCL 49-31-12.4, the rate increase should be suspended for 120 days.

A hearing was held on October 9 and 10, 1996, before the Commission. At a regularly scheduled meeting of the Commission on December 9, 1996, Commissioner Schoenfelder moved to reopen the record for the taking of more evidence. The motion was seconded by Commissioner Burt with Chairman Stofferahn dissenting. The motion was based upon the treatment of reproduced depreciation, a quantifiable effect of the cost model and associated rate shock on small resellers, and verification of numbers used in the cost model. A transcript of the motion is available from the court reporter for the Commission.

A procedural schedule for testimony and a hearing on this matter shall be as follows:

DATE	PROCEDURAL SCHEDULE
March 5, 1997	parties shall simultaneously file prefiled testimony
March 12, 1997	parties shall simultaneously file rebuttal testimony
March 19, 1997 through March 21, 1997	Hearing, commencing at 9:00 a.m. March 19, 1997, Room 412 State Capitol Building, Pierre, South Dakota

The Commission has jurisdiction in this matter pursuant to SDCL Chapter 1-26 and 49-31 and ARSD 20:10:27 to 20:10:29, inclusive. The Commission may rely upon any or all of these or other laws of this state in making its determination.

¹TAG members include Midco Communications, TCIC Communications, TeleTech, FirstTel, and Tel Serv.

The issue at the hearing is whether U S WEST's application to increase its Carrier Common Line Access Charge, Interconnect and Local Switching rates shall be granted.

The public is invited to participate by testifying at the hearing. All persons so testifying will be subject to cross-examination by the parties. The order of the proceeding will be in the following sequence: (1) Applicant; (2) Staff; and (3) Intervenors.

The hearing, a continuance of the hearing held on October 9 and 10, 1996, is an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the evidence and hearing testimony presented by the parties, shall make Findings of Fact, Conclusions of Law, and a Final Decision. As a result of the hearing, the Commission may either approve or reject the proposed increase to the Carrier Common Line Access Charge, Interconnect and Local Switching rates or otherwise set these rates. The Final Decision may be appealed by the parties to the Circuit Court and the South Dakota Supreme Court as provided by law. It is therefore

ORDERED that a hearing shall be held on the application for an increase in the Carrier Common Line Access Charge, Interconnect and Local Switching rates at the time and place specified above.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 10 day of January, 1997.

<p align="center">CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by hand or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p><i>William Bullard, Jr.</i></p> <p>Date: <u>1/10/97</u></p> <p align="center">(OFFICIAL SEAL)</p>

BY ORDER OF THE COMMISSION:
Commissioners Stofferahn, Burg and
Schoenfelder

William Bullard, Jr.
WILLIAM BULLARD, JR.
Executive Director

LAW OFFICES
OLINGER, LOVALD, ROBBENOLT & McCAHREN, P.C.
117 EAST CAPITOL
P.O. BOX 66
PIERRE, SOUTH DAKOTA 57501-0066

OLINGER, LOVALD, ROBBENOLT & McCAHREN
117 EAST CAPITOL
P.O. BOX 66
PIERRE, SOUTH DAKOTA 57501-0066

TELEPHONE 224-8851
AREA CODE 605
FAX 605-224-8269

January 16, 1997

RECEIVED

JAN 16 1997

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

William Bullard, Jr., Executive Director
50 FWC, State Capitol
100 E. Capitol
Pierre, SD 57501

RE: Docket TC96-107

Dear Mr. Bullard:

Enclosed herewith please find original and 11 copies of AT&T
Communications of the Midwest, Inc.'s Motion To Disapprove Rate
Increases and Close Docket with regard to the above-captioned
docket.

Please furnish a file stamped copy to me.

Thank you.

Yours very truly,


JOHN S. LOVALD
Attorney at Law

JSL/lr

Enclosure

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RECEIVED

1980

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

Docket No. TC96-107

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits its motion to (1) disapprove the resolution of U S WEST Communications, Inc. ("U S WEST") for an increase in switched rates and (2) close the existing docket:

U S WEST had months in which to present competent evidence in this docket in support of its application to raise switched access rates. Instead, U S WEST submitted only uncorroborated, secondary evidence. After the hearing was adjourned and the post-hearing briefs were filed, the Commission found U S WEST's evidence insufficient to approve a rate increase. The Commission also found that the case presented by U S WEST represented "rate shock" that could be "devastating" to the interests of South Dakotans. Nevertheless, the Commission agreed to reopen the record to permit U S WEST another chance to make its case.

U S WEST has now told the Commission that it intends to implement its rate increase on January 28, 1997, which falls prior to the dates on which the Commission has set additional proceedings in this docket. The purported basis for U S WEST's position is reliance on state statutes. Given the history of this case and the existing record, permitting an increase to go into effect pending further proceedings would not serve the interests of justice. Based on the

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existing record, the just result would be for the Commission to deny the rate increase and close this docket before the January 28, 1997 deadline that U S WEST purports is applicable to this matter.

Denying the rate increase and closing the docket is the safest way for the Commission to protect the interests of the residents, businesses, employees and telecommunications providers who will be harmed by the drastic rate increase U S WEST contends it is entitled to implement. In contrast, under the circumstances, U S WEST will not be prejudiced by such an action. U S WEST has already had one full and fair opportunity to present its case. The reason the Commission has insufficient evidence to approve the rate increase is that U S WEST failed to meet its burden to produce such evidence during the original hearings. U S WEST's failure to meet its burden means one of two things: (1) U S WEST had no such evidence, should not have filed the application in the first place, and will not be able to support the increase with further proceedings; or, less likely but theoretically possible, (2) U S WEST did have such evidence earlier but chose to withhold it. Either way, the just result is to close the current docket to prevent the statute from rewarding U S WEST's dilatory tactics.¹

Of course, if U S WEST really believes that it can meet its burden of proof with new evidence, U S WEST has the ability to pursue a rate increase through a new application. However, U S WEST received the opportunity to meet its burden during the original hearings in this docket, and should not receive the opportunity to pursue additional proceedings in this docket, rather than in a new docket, as a pretext to implementing a rate increase prior to the completion of the new hearings.

¹ Permitting the rate increase to go into effect under the current circumstances would have the additional detrimental effect of setting a bad precedent. Those seeking rate increases in the future would realize that they could obtain temporary increases merely by filing incompetent evidence just to keep a docket open beyond the six months. Properly timed, this would permit such companies to obtain strategic influxes of cash reserves, and concomitant decreases in the cash reserves of competitors at exactly the time that competitors may need cash reserves to adequately compete -- or to survive in the case of smaller competitors with thinner margins.

■ FACTUAL BACKGROUND

On July 1, 1996, U S WEST filed its tariff containing an increase of more than one-hundred percent in its switched access rates and setting the proposed effective date of the increase to occur on August 1, 1996. On July 30, 1996, the Commission granted the interventions of AT&T, along with other interested parties, and suspended the operation of the proposed rate increase. On October 9-10, 1996, the Commission held hearings on this docket. The Chairman formally ended the hearings, stating on the record: "This hearing is now adjourned." See Transcript of Proceedings, dated October 10, 1996, p. 374, l. 23.

On December 19, 1996, the Commission moved to reopen hearings in TC 96-107 regarding U S WEST's application to increase its switched access rates. The Commission based this ruling on the lack of sufficient evidence in the record to approve U S WEST's request at that time. Commissioner Schoenfelder, in moving to reopen the record, stated, inter alia:

1. "This case, as presented by U S WEST, represents rate shock in my opinion, in the worst sense of the term. Evidence at the hearing shows that this proposed increase in access rates may be devastating to several small South Dakota companies who employ dozens of South Dakotans. This shouldn't be allowed to happen."
2. "... one of the witnesses talked in terms of the numbers which went into the cost study as needing scrubbing. This was interpreted by the witness to mean that an audit should have been done. I am not comfortable with the record in this regard. U S WEST's primary witness, Culp, testified that he only acted in a supervisory capacity as far as the inputs for the cost model.... The staff analyst testified that no numbers were verified and the staff relied upon what I would term to be secondary sources for their analysis."
3. "... given this high degree of uncertainty, I feel the evidence that has been presented, I cannot vote for the approval for an increase in switched access charges. Given that choice, I would reopen the record for the taking of more evidence..."
4. "... the parties should be allowed adequate time to do the necessary preparatory work."

Transcript of Proceedings, dated December 19, 1996, pp. 3-5 (emphasis added). Similarly, Commissioner Burg, seconding the motion, stated, inter alia:

1. "I can't understand that the rates ought to be that much different, and I have not been convinced that we have the adequate backup data, in other words, the audited inputs to prove that that is necessary."

2. "I, too, am not satisfied that we have enough input for me to make a decision to double the rates at this time."

SL pp. 5-6 (emphasis added). In short, the Commission's decision reflected the fact that U S WEST failed to meet its burden of proof regarding the application. See 49-31-12.4(3) ("burden is on the company [filing the tariff] to prove that the tariff is fair and reasonable"); Cf. Turner Grocery Co. v. Chicago, M. & St. P. Ry. Co., 36 S.D. 310, 154 N.W. 819 (1915) (same, under former law)

By letter from Jon Lehner to Bill Bullard, dated January 6, 1997, U S WEST informed the Commission that U S WEST intends to unilaterally implement its rate increase on January 28, 1997, regardless of when the reopened proceedings are completed. On January 10, 1997, AT&T received notice that the new hearings had been set for March 19-21, 1997. Therefore, the new hearings will not be completed before U S WEST unilaterally implements its rate increase.

PERMITTING U S WEST'S APPLICATION TO GO INTO EFFECT WOULD BE DETRIMENTAL TO THE INTERESTS OF SOUTH DAKOTANS

The Commission's ruling on December 19, 1996, expressly recognized the potentially devastating results that could occur from U S WEST's proposed rate increase. The record supports the reality that the harm from the proposed increase may be felt by residents and businesses who use telephone services, businesses who provide telephone services, and employees who work at businesses where expenses would dramatically rise as a result of a rate increase. The only party who would benefit from an increase in rates is the one who failed to meet its burden of proof in this case: U S WEST. It would be unjust to permit such a result based on the current record.

The Commission certainly cannot complete the additional fact-finding it has ruled would be necessary to approve the rate increase by January 28, 1997, which is the date that U S

WEST has said it intends to unilaterally increase the rates. The recently issued procedural schedule setting the additional proceedings for March 1997 confirms this fact. Accordingly, assuming, arguendo, that state law permits U S WEST to implement a unilateral rate increase on January 28, 1997, then the only equitable choice left to the Commission is to make its final ruling based on the existing record and close this docket prior to that date.² The current record compels the Commission to deny the rate increase.³

IV. U S WEST WILL NOT BE PREJUDICED BY DENIAL OF ITS APPLICATION BASED ON THE CURRENT RECORD, AND THE COMMISSION HAS NO DUTY TO PROVIDE U S WEST ANOTHER CHANCE TO PRESENT EVIDENCE IN THIS DOCKET, RATHER THAN REQUIRING U S WEST TO INITIATE A NEW DOCKET

Denial of the application would not prejudice U S WEST, because the record to date fully satisfies all due process obligations required on this matter. U S WEST had the opportunity to (1) file whatever evidence it had in support of its application, (2) file a pre-hearing brief, pre-hearing rebuttal brief, post-hearing brief and post-hearing rebuttal brief, and (3) present

² U S WEST's alleged ground for asserting that it can implement its rates on January 28, 1997, is the contention that South Dakota law permits U S WEST to implement its rate increase 180 days after the proposed effective date of the rate increase "if the Commission has not made their decision by that time." See Letter from John Lehner to Bill Bullard, dated January 6, 1997. U S WEST's interpretation ignores the plain language of the law. The statute to which U S WEST presumably is referring is 49-31-12.4(2), which limits tariff suspensions to 180 days "pending any hearing" concerning the propriety or reasonableness of the proposed rate. Thus, the limit is linked to the start of a "hearing," not to "making a decision." The clear purpose of this statute is to insure that the Commission diligently sets a hearing on tariff disputes. Here, the Commission did start a hearing on the matter within 180 days. Accordingly, the statute on its face does not apply to the present situation. At best, the adjournment of the original hearing began a new 180 day limitation period starting from October 10, 1996.

Furthermore, even if the language of the statute had said pending a "decision," as U S WEST contends -- rather than pending a "hearing," -- the statute still would not apply here because the Commission did, in fact, make a decision within 180 days. On December 19, 1996, the Commission decided that insufficient evidence existed based on the case U S WEST presented at the hearing. Ironically, U S WEST's interpretation of the statute would mean a restarted 180 day clock beginning even later -- December 19, 1996.

³ Indeed, it would be an invitation to commit reversible error for U S WEST to ask the Commission to approve its application or to permit the increase to go into effect pending further proceedings when the existing record is insufficient to justify a rate increase.

and cross-examine witnesses during two days of duly noticed hearings. The Commission is not required to give U S WEST another bite at the apple in this docket simply because U S WEST failed to make its case during the original proceedings. U S WEST is free to file a new application at any time that it believes it has sufficient evidence to support it.

If U S WEST wants to go forward with the fact-finding inquiry in this docket, that procedure should be conditioned on U S WEST agreeing to waive any assertion that it may increase its switched access rates prior to completion of such proceedings. Otherwise, the Commission has every right to, and should, enter a final ruling denying the existing application, closing this docket, and requiring U S WEST to file a new application as the mechanism for it to submit new evidence.

V. THE COMMISSION SHOULD SANCTION AN AUDIT OF U S WEST'S COST STRUCTURE

Regardless of the outcome of this docket, the Commission should sanction an audit into U S WEST's cost structure similar to the audit that occurred in Washington. See, e.g., Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Docket No UT 950300, "Commission Decision And Order Rejecting Tariff Revisions; Requiring Refiling," dated April 11, 1996. The Commission was right to question U S WEST's unverified, secondary data. Based on the record in this case, there is sufficient reason and concern for the Commission to initiate a new docket for the purpose of an audit extending to all areas related to U S WEST's costs of providing telecommunications services in South Dakota.

VI. SCHEDULING FOR THIS MOTION

The Commission does not need to have a hearing to rule on this motion since it is based on facts that are already established in the existing record. Accordingly, the Commission may rule on this motion from the bench without a hearing. In the alternative, if the Commission decides to have a hearing on this motion, AT&T recommends that it occur on January 23, 1997,

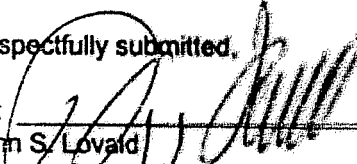
when the parties will be in Pierre, South Dakota in connection with TC 96-153 (Local Competition Rules).

VI. CONCLUSION

For the foregoing reasons, the Commission should deny U.S. WEST's application and close the existing docket before January 28, 1997.

DATED: January 15, 1997

Respectfully submitted,

By: 
John S. Lovald
Olinger, Levald, Robbennolt & McCahren, P.C.
117 East Capitol
P.O. Box 66
Pierre, SD 57501-0066
(605) 224-8951

Maria Arias-Chapleau
Mary Tribby
AT&T Communications Of The Midwest, Inc.
1875 Lawrence St., Suite 1500
Denver, CO 80202
(303) 298-6232

Glenn E. Solomon
Sidley & Austin
555 W. 5th Street, 40th Floor
Los Angeles, CA 90013
(213) 896-6611

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of MOTION TO DISAPPROVE RATE INCREASE AND CLOSE DOCKET upon the following:

William P. Heaston
Senior Attorney
US West Communications, Inc.
1801 California Suite 5100
Denver, CO 80202

Thomas J. Welk
Attorney at Law
PO Box 5015
Sioux Falls, SD 57117-5015

by Federal Express and first class mail, postage prepaid and to the following:

Donald A. Low
Senior Attorney
Sprint Communications Company
8140 Ward Parkway
Kansas City, MO 64114

Brian B. Meyer
Attorney at Law
Meyer & Rogers
PO Box 89
Onida, SD 57564

David A. Gerdes
Attorney at Law
May, Adam, Gerdes & Thompson
Box 280
Pierre, SD 57501

Robert G. Marnett
Attorney at Law
DCT
PO Box 66
Irene, SD 57837

Pamela Robinson
Manager, Regulatory Affairs
LDDS WORLDCOM
1705 S. Capital of Texas Hwy Ste 100
Austin, TX 78746

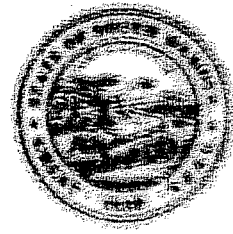
Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
PO Box 626
Pierre, SD 57501

by first class mail, postage prepaid on this 16th day of January, 1997.



John S. Loefer

South Dakota Public Utilities Commission



State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

RECEIVED

January 16, 1997

JAN 16 1997

Mr. Jon Lehner
Director-Regulatory Affairs
U S WEST Communications, Inc.
125 South Dakota Avenue, 8th Floor
Sioux Falls, SD 57194

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Dear Mr. Lehner:

Thank you for your letter of January 6, 1997, informing the Commission of your company's intentions vis-a-vis the December 19, 1996, Order in Docket No. TC96-107. As you indicated, the Order lacks specificity regarding the exact nature of the additional evidence sought by the Commission.

In an effort to provide guidance to the parties in this docket, I issued a procedural notice on January 10, 1997, identifying the issues raised in the motion to reopen the record. In addition, this notice informs the parties that a transcript of the relevant motion is available from the court reporter for the Commission. Commission Staff, in this circumstance, cannot be more definitive in providing guidance other than that described in the notice.

The Commission today received a Motion to Disapprove Rate Increase and Close Docket filed by AT&T. The Commission is presently considering whether it shall schedule a time prior to the scheduled March 19-21, 1997, hearing date for purposes of addressing this motion. Other than to perhaps address such formal filings as represented by this instant motion, the Commission does not intend to deviate from its procedural schedule issued on January 10, 1997.

I appreciate your offer to cooperate with Staff in availing whatever information they may need in preparation for the upcoming March hearing. Staff will be contacting you soon in this matter to discuss accessing such information.

Sincerely,

William Bullard Jr.
Executive Director

cc: Dakota Co-op
MCI
AT&T
TAG
Sprint

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ESTABLISHMENT OF SWITCHED ACCESS RATES FOR U S WEST COMMUNICATIONS, INC.)))	ORDER FOR AND NOTICE OF HEARING TC96-107
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On June 24, 1996, U S WEST Communications, Inc. (U S WEST) filed for approval by the Public Utilities Commission (Commission) its 1995 switched access cost study. According to the application, the study develops an overall average calculated rate of \$0.066 per minute required to recover the costs of providing switched access.

On June 27, 1996, the Commission electronically transmitted notice of the filing and the intervention deadline of July 12, 1996, to interested individuals and entities. The following companies were granted intervention on July 30, 1996: Sprint Communications Company L.P. (Sprint); MCI Telecommunications Corporation (MCI); Express Communications, Inc. (Express); AT&T Communications of the Midwest, Inc. (AT&T); Telecommunications Action Group (TAG)¹; and Dakota Cooperative Telecommunications, Inc. (DCT). The Commission also found that pursuant to SDCL 49-31-12.4, the rate increase should be suspended for 120 days. The Commission directed the Executive Director to set a procedural schedule.

A hearing was held on October 9 and 10, 1996, before the Commission. At a regularly scheduled meeting of the Commission on December 9, 1996, Commissioner Schoenfelder moved to reopen the record for the taking of more evidence. The motion was seconded by Commissioner Burg with Chairman Stofferahn dissenting. A continuation of the hearing is scheduled for March 19 through 21, 1997, and a Procedural Order dated January 10, 1997, has been served on the parties.

On January 16, 1997, the Commission received a motion from AT&T to disapprove the rate increase and close this docket.

TAKE NOTICE that a hearing on the above-described motion will be held before the Commission on January 23, 1997, at the Governor's Inn, 700 West Sioux Avenue, Pierre, South Dakota, commencing at 9:00 A.M. and ending at 10:00 A.M.

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31 and ARSD 20:10:27 to 20:10:29, inclusive. The Commission may rely upon any or all of these or other laws of this state in making its determination.

The issue at the hearing is whether AT&T's motion shall be granted.

The order of the proceeding will be in the following sequence: (1) AT&T; (2) U S WEST; (3) Staff; and (4) remaining Intervenors.

¹TAG members include Midco Communications, TCIC Communications, TeleTech, FirstTel, and Tel Serv.

The hearing will be conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the decision of whether or not the motion is granted will be based on arguments and authority presented at the hearing. A final decision may be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the arguments and authorities presented by the parties, shall make a ruling on the granting of AT&T's motion. A Final Decision may be appealed by the parties to the Circuit Court and the South Dakota Supreme Court as provided by law. It is therefore

ORDERED that a hearing shall be held on AT&T's motion to disapprove the rate increase and close the docket at the time and location mentioned above.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 17 day of January, 1997.

<p>CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p><i>William Bullard, Jr.</i></p> <p>Date: <u>1/17/97</u></p> <p>(OFFICIAL SEAL)</p>
--

BY ORDER OF THE COMMISSION:
Commissioners Burg, Nelson and
Schoenfelder

William Bullard, Jr.
WILLIAM BULLARD, JR.
Executive Director

LAW OFFICES
RITER, MAYER, HOFER, WATTIER & BROWN, LLP
Professional & Executive Building
319 South Coteau Street
P. O. Box 280
Pierre, South Dakota 57501-0280

R. C. RITER (1913-1974)
R. E. MAYER
ROBERT D. HOFER
ROBERT C. RITER, JR.
JENNIFER L. WATTIER
JAMES L. BROWN

DAVID A. PFEIFFER

TELEPHONE
605-224-3045
TELEFAX
605-224-1100

RECEIVED

January 21, 1997

Mr. William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
State of South Dakota
200 East Capitol
Pierre, SD 57501

Re: TC 96-107
IN THE MATTER OF THE ESTABLISHMENT
OF SWITCHED ACCESS RATES FOR US
WEST COMMUNICATIONS, INC.

Dear Mr. Bullard:

Herewith hand delivered to you please find original and ten
copies of Motion to Join AT&T Motion to Disapprove and Close
Docket along with original Certificate of Service. Please file
same in your office.

Thank you.

Very truly yours,

RITER, MAYER, HOFER, WATTIER &
BROWN

By:

David A. Pfeiffer

DAP-wb

Enclosures

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED

IN THE MATTER OF THE ESTABLISHMENT) TC 96-107
OF SWITCHED ACCESS RATES FOR US)
WEST COMMUNICATIONS, INC.)

SOUTH DAKOTA PUBLIC
UTILITY COMMISSION

MOTION TO JOIN AT&T MOTION TO DISAPPROVE AND CLOSE DOCKET

COMES NOW the Telecommunications Action Group,
hereinafter T.A.G.¹, by and through its attorneys and submits the
following Motion to Join AT&T's Motion to Disapprove and to close
docket TC96-107.

I. PRELIMINARY STATEMENT

After the Commission ruled that U.S. West had not met
its burden to prove its proposed switched access rate increase
was fair and reasonable, the Commission agreed to reopen the
docket. New hearings were set for March 19-21, 1997. In the
interim, U.S. West informed the Commission that it intends to
unilaterally increase its switched access rates on January 28,
1997. On January 16, 1997, AT&T filed a Motion to Disapprove
Rate Increase and to Close Docket TC96-107. T.A.G. seeks to join
in AT&T's Motion.

References to the October 9-10, 1996 hearing shall be
denoted by "T.R." followed by the appropriate page number. All
exhibit references are from exhibits admitted at the October 9-
10, 1996 hearing.

¹ The Telecommunications Action Group consists of Mideo
Communications, Inc., TCIC Communications, TeleTech, FirstTel,
Inc. and Tel Serv.

I. FACTUAL BACKGROUND

On June 24, 1996, U.S. West filed a cost study with the Public Utilities Commission, seeking to increase switched access rates from 3.14 cents to 6.4 cents per minute. At the October 9-10, 1996 hearing, U.S. West changed its request to a switched access rate of 6.15 cents per minute. The Commission ruled that U.S. West did not meet its burden of proving the proposed rate increase was fair and reasonable.

II. THE PROPOSED INCREASE WOULD BE DETRIMENTAL TO SMALLER PROVIDERS WHO COULD NOT SHIFT COSTS

T.A.G. is comprised of five locally owned telecommunications carriers whose customers reside primarily in South Dakota. At the October 9-10, 1996 hearing, unrefuted testimony indicated that switched access costs represent approximately fifty (50) percent of the direct costs of doing business for T.A.G. members. (T.R. at 190; 224; 248) The increase sought by U.S. West would effectively double the switched access rates for carriers operating in South Dakota. (Law, Ex. 13 at 2; T.R. at 256; Noonan, Ex. 10 at 2) T.A.G. members could not absorb the increase and would be forced to pass on the increase to their South Dakota customers. (T.R. at 189; 248; 256)

Several TAG members have customer contracts which prevent them from passing on increased costs to their customers in the near future. (T.R. at 201) These term contracts with South Dakota customers freeze rates at the current level for one to three years. (T.R. at 189; 233) These contracts have helped

South Dakota customers keep their rates low. (T.R. at 233; 243) Some T.A.G. members would be financially unable to continue these contracts if the switched access rate were doubled. (T.R. at 201; 233) As a result, South Dakota consumers would no longer have the benefit of these lower, fixed rates. Id.

Through competition among T.A.G. members and others in the market, telephone rates for South Dakota consumers are competitive and have been kept relatively low. (T.R. at 138; 243) Unrefuted testimony indicated that the proposed increase would stifle competition and require many current providers to cease doing business or significantly reduce their operations and ultimately, increase costs for South Dakota consumers. Large companies could absorb the increase and distribute cost increases among customers in several states. However, smaller South Dakota carriers would be forced to pass on the increase to their South Dakota customers.

Even if the increase were short-term, it would have a detrimental effect upon smaller, South Dakota based carriers. As noted above, increased costs could not be absorbed by smaller carriers. The increased costs would mean smaller South Dakota providers could no longer compete with large multi-state providers who could spread costs across several markets. The increase would stifle competition, and eventually lead to higher rates for South Dakota consumers.

For these reasons, T.A.G. joins in AT&T's Motion to Disapprove Rate Increase and to Close Docket.

Respectfully submitted this 21st day of January, 1997.

RITER, MAYER, HOPER, WATTIER
& BROWN

By:



David A. Pfeiffer
319 S. Coteau P. O. Box 280
Pierre, SD 57501-0280
Attorneys for Telecommunications
Action Group (T.A.G.)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT) TC 96-107
OF SWITCHED ACCESS RATES FOR US) CERTIFICATE OF SERVICE
WEST COMMUNICATIONS, INC.)

I, David A. Pfeifle, certify that a true and correct copy of Motion to Join AT&T Motion to Disapprove and Close Docket were mailed by first class mail to each of the following on the 21st day of December, 1997:

William P. Heaston
Senior Attorney
US West Communications, Inc.
1801 California, Room 5100
Denver, CO 80202

Richard P. Tieszen
Attorney at Law
P. O. Box 626
Pierre, SD 57501

Thomas J. Welk
Tamara A. Wilka
Attorneys at Law
P. O. Box 5015
Sioux Falls, SD 57117-5015

David A. Gerdas
Attorney at Law
P. O. Box 160
Pierre, SD 57501

Robert G. Marmet
Thomas Hertz
Attorneys at Law
P. O. Box 269
Centerville, SD 57014

Brian Meyer
Attorney at Law
P. O. Box 89
Onida, SD 57564

John S. Lovald
Attorney at Law
P. O. Box 66
Pierre, SD 57501

Donald A. Low
Senior Attorney
Sprint Communications Company
8140 California, Ste. 5100
Denver, CO 80202

Pamela Robinson
Manager, Regulatory Affairs
LDDS Worldcom
1705 S. Capital of Texas Hwy,
Ste. 100
Austin, TX 78716

and that true and correct copies of the above were faxed to the following on the 21st day of January, 1997:

William P. Heaston - 303-295-7069
Thomas Welk - 605-334-0618
Robert Marmet - 605-263-3995


David A. Pfeifle

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

COUNTY OF HUGHES)

SS

SIXTH JUDICIAL CIRCUIT

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT)
OF SWITCHED ACCESS RATES FOR)
U S WEST COMMUNICATIONS, INC.)

DOCKET TC96-107

ORDER ADMITTING
NON-RESIDENT
ATTORNEY TO PRACTICE

* * * *

The non-resident attorney in the above-entitled action, namely, Glenn E. Solomon, of Sidley & Austin, 555 W. 5th Street, 40th Floor, Los Angeles, CA 90013, having moved the Court pursuant to SDCL §16-18-2 to be allowed to practice before this Court in the above-entitled matter, and said motion being supported by the Motion of John S. Lovald of Pierre, South Dakota, an attorney licensed to Practice in the State Courts of South Dakota, and the Court having examined the motions and being fully advised in the premises, now, therefore, it is

ORDERED that Glenn E. Solomon's Motion for Admission to Practice before this Court, and in the above captioned Public Utilities Commission Docket, be and it is granted.

DATED at the Pierre, South Dakota, this 22 day of January, 1997.

BY THE COURT:

Circuit Court Judge

ATTEST:

May L. Erickson
Clerk of Courts

(SEAL)

By Stanley Cronin, Dep

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JAN 22 1997

1268

May L. Erickson

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT
OF SWITCHED ACCESS RATES FOR
U S WEST COMMUNICATIONS, INC.

TC96-107

HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS:

January 23, 1997

9:00 A.M.

Conference Room, Governor's Inn
Pierre, South Dakota

PUC COMMISSION:

Jim Burg, Chairman

Laska Schoenfelder, Commissioner

Pam Nelson, Commissioner

COMMISSION STAFF

PRESENT:

Rolayne Ailts Wiest

Karen Cremer

Camron Hoseck

Harlan Best

Dave Jacobson

Gregory A. Rislov

Bob Knadle

William Bullard, Jr.

Reported by: Lori J. Grode, RMR

A P P E A R A N C E S

For US West:

Thomas J. Welk
P.O. Box 5015
Sioux Falls, SD 57117-5015

For SDITC:

Richard D. Coit
207 East Capitol
Suite 206
Pierre, South Dakota, 57501

For DCT, DTI &
DTS:

Robert G. Marmet
P.O. Box 66
Irene, South Dakota 57037

For AT&T:

Glenn Solomen
Room 1575
1875 Lawrence St.
Denver, CO 80202

and

John S. Lovald
P.O. Box 66
Pierre, South Dakota, 57501

For TAG:

David A. Pfeifle
P.O. Box 280
Pierre, SD 57501

and

Robert C. Riter, Jr.
P.O. Box 280
Pierre, SD 57501

For Sprint:

Thomas H. Harmon
P.O. Box 626
Pierre, SD 57501

P R O C E E D I N G S

THE CHAIRMAN: Good morning. I think we'll start the hearing.

This is in the TC96-107. I'm Jim Burg, Chairman of the Commission. We also have Laska Schoenfelder, Commissioner, and Commissioner Pam Nelson here.

On January 16, 1997, the Commission received a Motion from AT&T to disapprove the rate increase and close this docket. We established today, January 23rd, 1997, at the Governor's Inn commencing at 9 o'clock to hold the hearing addressing that issue only of whether or not we should disapprove the rate increase and to close the docket.

With that I'm going to turn it over to Cannon Hoseck, who is the Commission counsel on this particular issue, and he's going to conduct the hearing.

MR. HOSECK: The record should reflect that this is the time and place set for hearing in this matter. Initially, I would announce for the record that Commissioner Nelson will not be participating in this decision on this particular motion. And the motion that is before the Commission is by AT&T to disapprove the rate increase and to close the docket.

1 this matter.

2 This motion has been joined in by the TAS
3 group as per filings that were with the Commission as
4 of close of business yesterday.

5 The Notice in this matter provides that we
6 have one hour to entertain this motion, and we're going
7 to adhere to that. So at this time I would like
8 appearances from the counsel, and then we'll try to
9 work out a schedule as to how much time will be
10 allocated to the various parties.

11 So could the various counsel for the various
12 parties make your presence known?

13 MS. CREMER: Karen Cremer for staff.

14 MR. WELK: Tom Welk from Slack Valley for U S
15 West Communications.

16 MR. LOVALD: John Lovald as local counsel for
17 AT&T, and Glenn Solomen of Sibley and Austin on behalf
18 of AT&T. Mr. Solomen will be arguing the motion. A
19 few minutes ago I presented Mr. Hoseck with the order
20 signed by Judge Zinter admitting Mr. Solomen to
21 practice in this docket, as well as Docket 123.

22 MR. HOSECK: Is there anyone else appearing?

23 MR. PFEIFLE: Dave Pfeifle on behalf of TAS,
24 and Bob Riter is also here on behalf of TAS.

25 MR. MARMET: Robert Marmet on behalf of

5
1 Dakota.

2 MR. HARMON: Tom Harmon on behalf of Sprint
3 Communications.

4 MR. HOSECK: Anyone else?

5 Mr. Solomen, as the moving party, how much
6 time do you think you would need to make your motion
7 initially?

8 MR. SOLOMEN: I would think ten minutes.

9 MR. HOSECK: Okay. How many of the other
10 participants wish to make an argument before the
11 Commission?

12 MR. WELK: U S West Communications desires to
13 be heard.

14 MR. HOSECK: Okay.

15 MR. MARMET: Dakota won't be making any
16 comments.

17 MR. HARMON: Sprint is in support of the
18 motion. It shouldn't be necessary to make a separate
19 argument.

20 MR. HOSECK: I think we should be able to
21 handle this within our allocated time.

22 MR. PFEIFLE: TAG has joined in the motion
23 and probably won't have any further comment.

24 MS. CREMER: Staff will be 30 minutes.

25 MR. HOSECK: I think we should be able to make

it in our allocated hour then. So with that in mind, why don't you go ahead and proceed, Mr. Solomon.

MR. SOLOMON: Thank you. Well, as I've set forth in the motion papers, and I'll try to make my comments brief. I guess we have to look at how we got here and what we've gotten to is a situation where we need to protect the interests of the South Dakota consumers, the businesses, and all the parties who would be harmed by a premature increase in the rates.

Now, the history is as follows: U S West filed its case but failed to meet its burden, and the Commission gave U S West another chance to meet that burden by presenting competent evidence for a rate increase.

U S West then said it was going to implement its rate increase before those proceedings could be completed, and that's how we got to where we are today. The problem is that U S West wants to put the cart before the horse. We don't know whether U S West has evidence that will support a rate increase or not, and it wouldn't be just to implement the rate increase before we get to that point. It would, in fact, be a bad precedent if we allowed U S West to start a proceeding, put sloppy evidence, incompetent evidence, secondary and unverifiable data into the record, get a

1 rate increase from that, and later on when we find out
2 we have to reverse the procedure, especially about when
3 we're talking about over a hundred percent rate
4 increase.

5 Now, the Commission already found and I'm
6 going to quote from the Commission's findings at the
7 time that the Commission did not -- or denied the
8 initial application and moved to reopen. Here's what
9 was said: Commissioner Schoenfelder said, "This case,
10 as presented by U S West, represents rate shock, in my
11 opinion, in the worst sense of the term. Evidence at
12 the hearing shows that this proposed increase in access
13 rates would be devastating to several small South
14 Dakota companies who employ dozens of South Dakotans.
15 This shouldn't be allowed to happen."

16 In addition, Commissioner Schoenfelder found
17 that U S West's primary witness testified that he acted
18 in only a supervisory capacity as far as the inputs for
19 the cost model. The staff analyst testified the
20 numbers weren't verified and the staff relied on what
21 would be termed -- what I would term to be secondary
22 sources for their analysis.

23 Given this high degree of uncertainty, I feel
24 that the evidence as been presented, I cannot vote for
25 the approval for an increase in switched access

charges. And that's when the decision was made to reopen the record.

Commissioner Burg seconded that saying, "I cannot understand the rates ought to be that much different. And I have not been convinced that we have adequate backup data; in other words, the audited inputs to prove it is necessary. I, too, am not satisfied we have enough input for me to make a decision to double the rates at this time."

And doubling the rates at this time is exactly what U S West proposes to do immediately before this Commission can complete its factual inquiry. And the Commission has no duty to reopen the record. It had a hearing. It gave U S West all due process necessary. Briefs were filed. We had argument. We had witnesses presented. We had cross-examination.

And under the circumstances, while reopening wouldn't have been a problem if U S West hadn't been seeking to implement its rate increase, now U S West is saying they're going to do what's necessary to get their money before they prove their case.

This would be premature, and this is something the Commission doesn't have to let happen, and it wouldn't be just in the situation.

And just to add what was properly noticed by

1 the Commission, that this could be devastating to South
2 Dakota companies who employ dozens of South Dakotans.
3 The people who would be harmed by a premature rate
4 increase would include the companies, would include the
5 people who are employed by those companies, would
6 include the customers who would see their rates go up.

7 It would shift a large amount of money to U S
8 West away from in addition to AT&T and the other
9 telephone companies, the smaller telephone companies
10 who perhaps cannot withstand having that shift occur.
11 To undo this later on wouldn't work because this is a
12 crucial time in telecommunications. This is a time of
13 competition. The smaller companies can't have money
14 taken from them at this time and given to U S West and
15 then a year later, or a few months later even, find
16 that that large amount of money will be returned, but
17 it's too late.

18 And so really what justice requires here,
19 since U S West wants to increase its rates before it
20 has presented its evidence is for the Commission to
21 close this docket, rule on this record, and U S West
22 won't be prejudiced. And if they have more evidence,
23 U S West can file a new case. If they had the
24 evidence, one presumes they would have filed their best
25 case already. And so one should presume there is no

more evidence. On the other hand, if they didn't have the evidence or if -- strike that. If they did have the evidence and withheld that evidence, they shouldn't be rewarded for that.

And that's really what brings us to this motion, and that really -- that concludes my opening argument, except to add that to the extent U S West seeks to -- sought to increase its rates to cause this hearing to have to occur and to cause this docket to be closed so as to avoid an audit, the Commission shouldn't allow that to happen. The Commission was right to want to audit the inputs.

And whether it happens in this docket or in another docket, it's something that should be looked into. It was done in other states. We've cited the Washington decision, which was the UT950200 decision, which resulted in an Order that was entitled Commission Decision and Order Rejecting Tariff Revisions Requiring Refiling. And that's what we think should occur here under the circumstances.

That concludes my opening.

MR. HOSECK: Okay. Are there any other proponents of the motion that would like to speak at this time?

MR. PFEIFLE: Dave Pfeifle on behalf of TAG.

We would like to echo what Mr. Solomen said and point the Commission's attention to the fact that these switched access rates compiles almost 50 percent of the cost of doing business for our TAG members. And to have a doubling of those costs at this time, these smaller South Dakota companies could not absorb these costs. They'd have to almost immediately pass the costs on to their South Dakota consumers. And this could have a devastating effect on the companies comprising TAG, and would have a devastating effect upon what South Dakota consumers are paying for rates at this time. We would join in the motion. Thank you.

MR. HOSECK: Any other proponents of the motion for the Commission?

MR. HARMON: Tom Harmon for Sprint. I, as stated, would support the motion. We have a peculiar result in administrative law in South Dakota precedent, as far as I can see, that where a party has rested and then has submitted the evidence that it believes is necessary is the -- and the Commission determines there was inadequate evidence, that the party can take advantage of that by unilaterally implementing the action that was the subject of the hearing. That seems an anomalous outcome, and we would support the motion.

in that regard.

MR. HOSECK: Are there any further proponents of the motion that wish to speak? If not, Mr. Welk.

MR. WELK: Thank you, Mr. Hoseck, members of the Commission. Welcome, Commissioner Nelson. I don't think I've met you before.

None of the comments made by counsel for AT&T concerning administrative procedural law in South Dakota. I respectfully submit that the Commission could not enter an order dismissing this docket. SDCL 1-26-35, which was never mentioned by anybody, requires this Commission to enter Findings of Fact and Conclusions of Law. Our South Dakota Supreme Court, since 1978, has held that it's an error in violation of that statute for any agency not to rule in a contested case, to enter Findings of Fact and Conclusions of Law. You cannot legally enter an order dismissing this docket without entering Findings of Fact and Conclusions of Law. You can reject the rate increase, but you must enter Findings of Fact and Conclusions of Law. Otherwise, it is clear error by this Commission.

So to take the suggestion of AT&T and the proponents that you can willy-nilly enter an order without making Findings and Conclusions would directly violate Supreme Court precedent which wasn't cited by

any proponent or discussed, neither -- except in a statute by AT&T has the applicable statute been discussed by anyone, and that is SDCL 49-31-12.4.

And let's do talk about the record in this case. The filing was made by U S West in June of 1996 for an effective date of August. Under SDCL 49-31-12.4(2) the Commission is specifically authorized to suspend the operation of the tariff and the use of practice. The statute further states the suspension may not last longer than 120 days beyond the proposed effective date of the practice. However, the Commission may extend the period for an additional 60 days. And also in that subdivision it does say that when you do suspend the tariff and the use of the rate with notice to the company of the reasons therefore.

This Commission did enter an appropriate order in part suspending the rate of practice on August 1st, 1996, but it stated no reasons to suspend the tariff, so that did not comply with the statute. The Commission had never, according to my knowledge and review of the record, has ever entered an order extending for an additional 60 days the suspended rate.

What AT&T failed to state in its arguments, in its written papers, or its argument this morning, is

subdivision five of SDCL 49-31-12.4 that says if the rate has been suspended pursuant to subdivision two, which it had been, and the Commission has not issued an order at the expiration of 180 days after the proposed effective date of the rate for the practice, the proposed change may go into effect at the end of such period. In the case of a proposed rate of price increase, the telecommunications company shall keep an accurate amount of all amounts received. The company shall specify by whom and whose behalf the amounts are paid. Upon completion of the hearing and the entry of a decision, the Commission may require the company to refund with interest those amounts that are determined to be unfair or unreasonable.

We are in a juncture, Commission, where the 180 days is about to expire on January 28th. You did not enter an order suspending it for an additional 60 days. But the company knows that you have this authority and we allowed it to be suspended for another 60 days. The company wants a decision. It's entitled to a decision.

We didn't ask to have the record reopened, contrary to what Mr. Harmon suggested; the Commission did. We are perfectly comfortable with the record. We don't want to open it. We believe that the record more

than supports, although Mr. Solomen was not there when the rate was done according to the Commission model. It was then there was no credible attacks to the model. And we believe that you are required by your rules to follow the rules and to follow the model.

We are entitled to our rate increase. If you do not believe that there's evidence to support it, then we respectfully request you to enter a decision, deny it, and we have our -- we have our available remedies to pursue what we may want to do. But the applicant and the people and the companies in this room are entitled to a decision according to applicable law. And that's exactly what we're following. We have the right to do this.

If somebody doesn't like this, go to the legislature and change it. But we are following the applicable law, and we're entitled to a decision, right or wrong, up or down, that's the point. And I respectfully request the motion be denied, that you enter an appropriate decision entering Findings of Fact, Conclusions of Law and support the rate increase that has been filed and the evidence presented in its behalf. Thank you.

MR. HOSECK: Rebuttal?

MR. SOLOMEN: Very brief. Well, I do want to

Point out I have not received a written opposition, so I was not privy to what the arguments would be. I'm not sure that we need one to go forward. The argument is that the Findings of Fact and Conclusions of Law have to be made. I feel the Commission did that, maybe not in one formal document, but certainly it's not what at this point to the motion.

Our motion is that this be decided by the bench. The Commission has made its findings based on the existing record. There's plenty of time to issue a Findings of Fact and Conclusions of Law document if it's believed by U S West that that is necessary in spite of the fact that such findings were already made at the December 19th hearing.

As for the statute that they're relying on, what U S West wants to do is to use the law in such a way that it will reach an unjust result. And I'm not saying that they're trying to misconstrue the law. I'm not addressing at all the applicability of the statute or not. But the result would be unjust. And the Commission has the power to use the law to reach a just result. It's made its findings. It's able to enter its conclusions of fact and law and that's what it should do.

The idea that a refund with interest would be

adequate in this situation really would be impractical here. As the TAG group has suggested, this would be devastating today. And sometimes a company is large enough to withstand rate increases of a hundred percent, but not all companies can do that. Not all small employers will be able to do that.

Finally, I believe I heard at the end of U S West's argument that they said what they really want is a decision. They feel they're entitled to one. They feel that they have made their record. They feel the rate increase should have been approved based on that record, but if the Commission disagrees, they want a decision. And I would agree with that. I think it's time for a decision. I just believe the Commission should make a decision to deny and that should be based on the Findings of Fact made and Conclusions of Law made at the December 19th hearing based on the existing record.

I will point out I was actually at the hearings. Mr. Welk may not recall me from them, but I was at the hearings. I was at the December -- I was on the phone at the time of the December 19th rulings, so I am aware of the prior ruling in this case. But our motion, I believe, stands and it's time to rule that the application should be denied and the docket should

be closed and it should be done by the 28th of January so that an unjust result doesn't occur.

MR. HOSECK: Does anyone else have any rebuttal?

MR. HARMON: If I might. I don't believe that I stated, contrary to Mr. Welk's statement, that U S West had requested permission to put more evidence on the record. I have not seen any request. And, in fact, it appears this morning that no one wants additional evidence in this record. U S West is not asking for it; the intervenors are not asking for it. It has never been suggested by anyone that this Commission not follow the law, that it not make its order based upon findings of fact.

And on this record, according to the testimony as set out in the brief -- not the testimony. Excuse me, the comments of the Commission as set forth in the brief, there is insufficient evidence to justify the rate increase that provides the necessary basis for the findings of fact that appear to be sought here rather than open for more evidence. And we would simply support that motion in that regard, that there is no need for it. The Commission has determined there's inadequate evidence on the record. The law should be followed, the Findings of Fact entered.

1 Thank you.

2 MR. HOSECK: Staff?

3 MS. CREMER: If I could, I found the motion
4 to be lacking in a few regards. If I could get AT&T to
5 answer a few questions first just to be sure I'm
6 understanding something they may not have meant.

7 MR. HOSECK: Yeah.

8 MS. CREMER: I guess, first of all, I'd ask
9 AT&T, you have referred to the secondary evidence as
10 sloppy, incompetent and unreliable, and I don't see
11 that anywhere in the transcript. And I just -- I
12 looked, trust me.

13 MR. SOLOMEN: I'm not saying -- those were my
14 characterizations.

15 MS. CREMER: So you're mischaracterizing the
16 record, would you agree?

17 MR. SOLOMEN: No, I disagree. What was
18 said --

19 MS. CREMER: Unverified.

20 MR. SOLOMEN: They were unverified from
21 secondary sources. We argued that it was sloppy, that
22 it was inappropriate, that it was not competent. They
23 argue that it is competent. But I'm not saying that
24 the commissioners used the word sloppy. I'm not saying
25 that sloppy work was done. I'm saying the evidence --

and I believe what I was getting at is the idea of throwing not sloppy, but slop something that is not of substance into the record.

MS. CREMER: Okay. I just wanted to be clear that everyone understood the Commission has not referred to it as sloppy.

MR. SOLOMEN: I'm not saying that to be the case at all.

MS. CREMER: Is that ARMIS? Is that the secondary evidence you're referring to as being incompetent, unreliable and sloppy?

MR. SOLOMEN: I'm referring to the whole record as not having competent evidence. And to the findings of the Commission, that it was secondary and insufficient to grant an increase at this time.

MS. CREMER: Actually you said unreliable, incompetent and sloppy secondary evidence. So is that ARMIS?

MR. SOLOMEN: I really don't want to point to any particular evidence. I want to say that everything that U S West put into the record was insufficient to justify a rate increase.

MS. CREMER: And as to the audit, who pays for that audit?

MR. SOLOMEN: Well, there are many ways to

1 answer that. In Washington, I believe that the state
2 paid for the audit. It may be that the just result is
3 to have an audit and based on the results, if the
4 results show that U S West was right on the money and
5 everything they said was correct, that it be allocated
6 toward the parties other than U S West. And if the
7 evidence shows that U S West's data from prior hearings
8 doesn't comport with the audit, that it should be
9 allocated more toward U S West. Perhaps what you do is
10 an equitable split at the beginning, readjusted by the
11 Commission based on the outcome of the audit.

12 MS. CREMER: Does the Commission have the
13 authority to do that?

14 MR. SOLOMEN: I believe they do. I believe.

15 MS. CREMER: Who did you have in mind to do
16 the audit?

17 MR. SOLOMEN: I don't believe that I'm in a
18 position to say who the Commission should want the
19 audit to be done by. They may want it done by staff.
20 They may want the parties to hire independent
21 auditors. They may want to hire a company of their
22 own. I really think that's not my decision to make as
23 to who it is. I would add that whoever they believe
24 they'll get the best results from is who they should
25 choose.

1 MS. CREMER: Okay. Well, based on that,
2 staff would recommend denying the motion for the
3 following reasons: As to the interest of justice that
4 was pointed out, the parties here have been told that
5 the docket would be reopened, and that was at the
6 commissioners request. It wasn't -- I believe
7 Mr. Harmon said no one requested it. And as I
8 understand what he meant, in actuality, the Commission
9 requested that it be reopened. And I believe that the
10 parties should prepare the information that has been
11 requested. To dismiss the docket at this juncture
12 would be a denial of due process.

13 I would point out that AT&T and TAG are wrong
14 in their statement that the Commission agreed to reopen
15 the hearing as was pointed out. Nobody asked that the
16 hearing be reopened. The Commission did that on their
17 own motion. There was not a motion by any of the
18 parties. I would also note that the movants here have
19 failed to point out that the Commission requested
20 information from other parties and not just U S West.
21 In fact, the first thing the Commission requested was
22 that the matter of represcribed depreciation be more
23 fully explained.

24 And, secondly, the Commission requested that
25 TAG present specific numbers as to any raise in the

1 access charge, what impact that would have on them.
2 These issues were raised by AT&T and TAG. And to
3 paraphrase Meryl Streep in the movie Out of Africa, one
4 should be careful what they pray for, for their prayers
5 may be answered. And staff believes that it's
6 incumbent upon AT&T and TAG to answer these requests
7 and not just dismiss the docket. It appears as though
8 TAG and AT&T merely raise these issues to muddy the
9 water and now they want the docket dismissed without
10 ever having to bring their proof forward. And staff
11 believes that that would be unfair at this point.

12 AT&T is also wrong in their assertion that
13 closing the docket will protect the interests of South
14 Dakotans. The issue has been raised numerous times
15 about potential competitive access providers that may
16 come into the state. And South Dakota consumers may be
17 better off having more than one access provider.

18 And as to the law, I would agree with U S
19 West. Somebody didn't read the statute completely
20 through. There is a subsection five in 49-31-12.4 and
21 that clearly states if a rate has been suspended and
22 there is not an order at the end of 180 days after the
23 proposed effective date, which was August 1, then that
24 proposed change goes into effect. U S West needs to
25 keep an accurate account of all amounts received by

1 reason of the increase. Upon completion of the docket.
2 the Commission may then require a refund of any portion
3 found to be unfair and unreasonable.

4 And for those reasons, staff would recommend
5 denying the motion and following the procedural
6 schedule that was set out before. Thank you.

7 MR. HOSECK: Is there anybody that has not
8 been heard from?

9 MR. SOLOMEN: May I reply to staff's
10 comment?

11 MR. HOSECK: Sure.

12 MR. SOLOMEN: I want to reiterate as we said
13 in the motion that we're not -- that we, AT&T, is
14 willing to proceed. What we're concerned about is
15 implementing the rate increase before completing the
16 proceedings. If U S West -- as said in the motion, if
17 U S West weren't trying to implement the rate
18 increases, then we wouldn't be seeking this motion.
19 And if they're willing to waive that, we're willing to
20 go forward. But when the Commission ruled to reopen
21 the docket, I don't think the Commission contemplated
22 that that would give U S West an immediate -- or strike
23 the word immediate. It would give U S West the
24 opportunity to implement the rate increase first, have
25 the rate increase in effect, go through hearings and

eventually have everything undone.

And as to the applicability of 49-31-12.4, it has been read all the way through, sub two and sub five. I referred to sub five twice when I referred to the idea of having the money refunded later on. That's just not going to be adequate. That's going to be unjust under these circumstances. The more than 100 percent rate increase that's going to be felt immediately. It's just not practical to keep records and undo that, nor would it be fair to the other parties.

The only party here who has a burden of proof is U S West. Under 49-31-12.4(3), and under the Turner Creamery case, both sides in the motion, U S West had the burden to complete the record. I don't believe that AT&T and the other parties have somehow muddled up the record. We, the imposing parties, AT&T's and others, are not responsible for U S West failing to provide competent evidence. There's nothing that we could have done to determine what U S West was going to provide being competent versus incompetent.

But, again, the problem here -- oh, and finally on due process, the problem is that this is not a matter of due process. They had due process. Due process means all the process you are due and entitled

to have. That's one set of briefing, one set of hearings, one set of closing arguments, one set of determinations by the Commission. And the Commission at that time ruled to reopen the hearings. I don't think they did that on the assumption that that would mean we'll have a rate increase today, then later on when the evidence never shows up, we'll undo it all. So it's the effectiveness of this statute that really brings us to where we are.

And, finally, whether as if quoting the statute applies or not, it doesn't say that when 180 days goes by there has to be an order. It says there has to be a hearing. We had a hearing. We had more than one day of hearings, and so I'm not going to say whether the statute applies or not. I'm going to say the best, safest, most efficient and just way to get to where we need to get today is to close these hearings and deny this application. If U S West has evidence to support a rate increase, they can file a new application and they can support it with the new evidence. If they had that evidence before, they should have put it into the record before.

MR. HOSECK: Thank you.

MR. WELK: Do I have any final opportunity to respond?

1 MR. HOSECK: Sure. Well, they're the moving
2 party, and they really have the right of rebuttal in
3 this matter. Does TAG wish to proceed?

4 MR. PFEIFLE: Thank you. TAG would like to
5 point out that U S West's own data showed this rate
6 increase would be 109 percent increase for the switched
7 access rates. And unrefuted testimony at the hearing
8 showed that switched access rates amount to almost half
9 of the cost of doing business for TAG members. TAG
10 members are primarily South Dakota companies employing
11 South Dakotans servicing South Dakotan consumers for
12 the most part. Even a rate increase that would last
13 only a few months could be devastating to these
14 companies. They cannot absorb these costs. They'd
15 have to pass it on to consumers and they'd lose
16 customers substantially. And many of them, their
17 viability as a company would greatly be affected and in
18 danger. To approve a rate increase of this magnitude
19 would be devastating to TAG and to South Dakota
20 consumers, and we'd urge the Commission not approve the
21 rate increase. Thank you.

22 MR. HOSECK: Back to your request, Mr. Welk.
23 I'm assuming this is an argument of law that you want
24 to make; is that correct?

25 MR. WELK: Well, yes, except to respond to

that which is the first time it's been raised again.
I'll confine any comments to whatever you want, but
I think we're entitled to respond.

MR. HOSECK: What we're also going to do is
open this up briefly for Commission questions if they
have any. And, furthermore, we will offer an
opportunity for briefing if the parties wish to do it
on a very expedited approach. But go ahead and make a
presentation.

MR. WELK: What the proponents are seeking to
do is to amend the legislature. They don't like the
practice. But this is what the law is. The Commission
is bound by the statutes given to it by the
legislature. And contrary to what AT&T's counsel
represented, subdivision five says, quote, "If a rate
has been suspended pursuant to subdivision two of this
section and the Commission has not issued an order at
the expiration of 180 days after the proposed effective
date of the rate or practice, the proposed change may
go into effect at the end of such period."

That's what the statute says. That's not
what arguments are. That's what the legislature said
the law is. And we had all of these arguments about
the rate increase before. They've known about this for
three years. Let's not willy-nilly around. The record

is refuted on that. This isn't something that was sprung on them the last six months. They've known a cost study existed for three years showing a rate of over six cents. And through the legal mechanisms and procedural processes that we have gone through, the company is entitled to the revenue according to the model that's promulgated by this Commission. And if those revenues are not coming forth, then they have to be made up someplace else. And as we testified at the hearing, that comes from residential customers. And we're entitled.

And I agree wholeheartedly with AT&T. Let's get on with it. Let's make a decision. Let's enter the findings, conclusions, and move on. We have a lot of other things to do. We've all had our chance. I agree with AT&T, I'm happy with the record. Let's move on.

MR. HOSECK: At this time are there any questions the Commission has of any of the parties?

THE CHAIRMAN: I probably have a couple. Mr. Pfeifle, it was explained the process of keeping a record and refunding whatever would not be proper under the Commission decision. Would that be adequate recourse for the TAG group?

MR. PFEIFLE: I don't believe so,

Mr. Chairman.

COMMISSIONER BURG: Why not?

MR. PFEIFLE: Because they would have to pass on the costs almost immediately because they can't spread the increased costs among like several markets or states like some other larger companies could do. I think TAG members couldn't absorb those costs so they would have to pass them on to consumers almost immediately. And even in the course of just a few months, I think they would lose a substantial amount of their customers and possibly face, you know, a threat to their viability as a company.

COMMISSIONER BURG: And you're saying if they lost their customers, even though they may be required to receive compensation from U S West for the lost business, it would not necessarily bring the customers back?

MR. PFEIFLE: I think once the company -- if the company is gone, what's a refund going to do at that point?

COMMISSIONER BURG: And I would ask staff, you did not comment very much on whether either other companies or consumers would be harmed if the rate was wrong and the ensuing refund procedure. Do you feel that would be adequate to cover any losses?

1 MS. CREMER: As to the company, I would agree
2 with U S West. The way I understand it -- I wasn't
3 with the Commission then. But in 93-108 there was a
4 cost study that showed over seven cents. Now, whether
5 that was completely accurate, it's unknown because it
6 was never tested, but it showed seven cents. So that
7 was in '93. They have issued contracts. Apparently
8 maybe they should have been written to include
9 increases ordered by the Commission. I don't know.
10 But to me, that that's a burden on the company. And so
11 as to the company, I guess I'm not as concerned. As to
12 the consumers of South Dakota, the AT&T's of the world,
13 the Sprints, the MCI's, this will be de minimis on them
14 in the increase when it's spread out over. As to the
15 smaller companies and their customers, I don't know
16 what the impact will be. And they have not come
17 forward other than to say really, really bad. And I
18 believe that's what Commissioner Schoenfelder was
19 asking in her request was what is really, really bad.

20 COMMISSIONER BURG: And I would ask
21 Mr. Solomen with AT&T, do you see any recourse to stop
22 the implementation of the rate increase if the
23 Commission would deny your request?

24 MR. SOLOMEN: I'm not sure I understand the
25 question.

COMMISSIONER BURG: In the law is there any other recourse for you if the Commission should deny the disapproval and the dismissal at this time as you request? Is there any recourse for you to stop the rate increase on the 28th?

MR. SOLOMEN: I don't know that there would be recourse that could occur quickly enough to stop the rate increase. Whether appeals could be had and gone through, by the time that cycle is completed, the rate increase would have gone into effect. And I think it's an odd situation that we have where what we're saying the party that had the burden should have been given their rate increase, then you should have hearing, then if you determine later they didn't deserve it, undo it. In the meantime the rate increase goes into effect and the money ends up with the party that didn't meet the burden. And that's a result the law doesn't require.

COMMISSIONER SCHOENFELDER: I have a couple, Mr. Solomen, I am very interested in if this motion is denied, is AT&T prepared and willing to go forward and to supplement this record?

MR. SOLOMEN: Oh, if AT&T's ready to go forward?

COMMISSIONER SCHOENFELDER: Well, your

Witness Pat Parker said before she had not done some analysis on some of the information that she was given. Is that analysis going to be done and be able to put in the record when we go forward with the hearing if we decide to do that?

MR. SOLOMEN: Absolutely, absolutely. But --

COMMISSIONER SCHOENFELDER: So I need to know -- I want to know if we're going to have the record supplemented if we deny this motion.

MR. SOLOMEN: Let me say, though, that we'll go forward with our side but we're going to need to see figures from U S West to work on. It's not just that we have all the figures and --

COMMISSIONER SCHOENFELDER: I thought your witness said that U S West had provided all the documentation that they needed?

MR. SOLOMEN: I don't believe they provided primary inputs. I don't believe we have primary inputs. I think we have secondary evidence.

COMMISSIONER SCHOENFELDER: Okay. We could address that any time. Mr. Pfeifle, can your companies quantify what this rate increase will do for them? And if they can't, are you willing to go forward and put that on the record if we do deny this motion?

MR. PFEIFLE: Yes, Commissioner. And I

1 mentioned earlier U S West had already provided to our
2 companies what the impact of the rate increase would be
3 and the percentage. That was approximately 109
4 percent, I believe, increase.

5 COMMISSIONER SCHOENFELDER: Is there anyone
6 that's not prepared to supplement this record? Thank
7 you.

8 MR. HOSECK: Any further questions from
9 Commissioners? If not, does anybody want to do any
10 briefing? We're working under a very expedited
11 approach to this. What I have in mind is that if
12 anybody wants to submit any authority, that it be done
13 in a very brief form and that we have it by Monday
14 morning by fax. So if anyone wants to submit any
15 additional authority on cases, we will establish that
16 as a deadline and that it be in the PUC office by 9:00
17 o'clock on Monday morning. And we can take it under
18 advisement, and the Commission will render a decision
19 sometime next week.

20 MS. CREMER: 9:00 o'clock Monday morning or
21 9:00 o'clock?

22 MR. WELK: U S West will not be submitting
23 any additional authority, Mr. Hoseck.

24 MR. SOLOMEN: AT&T will not submit any
25 additional authority. I'm not sure how I would ask U S

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West this question, but one question I'd have is U S
West prepared to not implement its rate increase just
so that we can get through these proceedings which are
going to occur and are set for March so that we
wouldn't need to bring this motion?

MR. HOSECK: Is U S West prepared to respond
to that?

MR. WELK: The rates will go into effect as
the law allows under 49-31-12.4.

MR. HOSECK: I think we understand where our
respective positions of the parties are in this
matter. And I would recommend that the hearing be
closed and taken under advisement.

COMMISSIONER BURG: Okay. The Commission
will close the hearing at this time, and it will be
taken under advisement.

(THE HEARING CONCLUDED AT 9:45 A.M.)

STATE OF SOUTH DAKOTA)

)

COUNTY OF HUGHES)

I, Lori J. Grode, RMR, a Notary Public in and for the County of Hughes and State of South Dakota, do hereby certify that the above hearing, pages 1 through 15, inclusive, was recorded stenographically by me and reduced to typewriting by me.

I FURTHER CERTIFY that the foregoing transcript of the said hearing is a true and correct transcript of the stenographic notes at the time and place specified hereinbefore.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Pierre, South Dakota, this 24th day of January, 1997.

Lori J. Grode
Lori J. Grode, RMR
Registered Merit Reporter
Notary Public

1 THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF SOUTH DAKOTA

3 RECEIVED

4 JAN 31 1997

5 SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

6 IN THE MATTER OF THE ESTABLISHMENT
7 OF SWITCHED ACCESS RATES FOR
8 U S WEST COMMUNICATIONS, INC.
9

10 FILE 107

11 HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

12
13 PROCEEDINGS:

January 27, 1997
State Capitol Building
Pierre, South Dakota

14
15
16 PUC COMMISSION:

Jim Burg, Chairman
Laska Schoenfelder, Commissioner
Pam Nelson, Commissioner

17
18
19 COMMISSION STAFF
20 PRESENT:
21
22
23
24
25

A P P E A R A N C E

For US West:

Jon Lehner and
Colleen Savold
125 S. Dakota Avenue
Sioux Falls, SD 57102

For DCT:

Robert G. Marnet
P.O. Box 66
Irene, South Dakota 57037

For AT&T:

Glenn Solomon
Room 1575
1875 Lawrence St.
Denver, CO 80202

For Midco:

Tom Simmons
410 S. Phillips Avenue
Sioux Falls, SD 57104-6828 888

For Sprint:

Thomas H. Harmon
P.O. Box 626
Pierre, SD 57501

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P R O C E E D I N G S

THE CHAIRMAN: This is Docket TC96-107
entitled In the Matter of the Establishment of Switched
Access Rates for U S West Communications,
Incorporated.

The record should reflect that this is the
time and the place scheduled for the permission action
on a motion by AT&T Communications of the Midwest,
Incorporated, to disapprove the application of U S West
Communications, Incorporated, for an increase in
switched access rates and to close the docket.

On January 24th, 1996, U S West filed for
approval by the Public Utilities Commission of the
1995 switched access cost study. Intervention was
granted to Sprint, MCI, Express Communications, AT&T,
Telecommunications Action Group, and Dakota Cooperation
Telecommunications. The rate increase was suspended
for 120 days pursuant to SDCL 49-31-12.4.

A hearing was held on October 9 and 10, 1996,
before the Commission. On December 9th, 1996, the
majority of the Commission voted to reopen the docket,
reopen the record for the taking of more evidence. A
hearing on this is scheduled for March 19th through 21,
1997.

On January 6th, 1997, U S West indicated that

1 it intended to implement the rate increase according to
2 the statutory provisions which allowed implementation.
3 Following this AT&T made its motion. On January 23rd.
4 1997, the Commission held a hearing on AT&T's motion
5 and it's time for a decision on this motion.

6 I'm going to call order of the roll, which I
7 probably should have done sooner to see if people are
8 on. Incidentally, the Commission -- I'm Jim Burg,
9 Chairman of the Commission. Laska Schoenfelder is also
10 present, as is Pam Nelson, the other Commissioner.

11 Mary Lohnes for Midco, are you on the line?

12 MS. LOHNES: Present, Commission.

13 THE CHAIRMAN: Tom Simmons of Midco?

14 MR. SIMMONS: Here, Mr. Chairman.

15 THE CHAIRMAN: Jon Lehner, U S West?

16 MR. LEHNER: Here, Commissioner.

17 THE CHAIRMAN: Robert Marmet, DCT?

18 MR. MARMET: Yes, sir.

19 THE CHAIRMAN: Tom Hertz, DCT? No, Tom is

20 not on. Colleen Sevold, U S West?

21 MS. SEVOLD: Yes, Commissioner.

22 THE CHAIRMAN: And Glenn Solomon?

23 MR. SOLOMON: Here, Mr. Chairman.

24 THE CHAIRMAN: Is there anybody on that I
25 haven't called? Okay. If not, that was the ones that

1 we had listed.

2 Are there any preliminary? Would any of the
3 parties have anything else that needed to be added? If
4 not, at this time I will entertain a motion as to
5 whether or not the Commission should grant AT&T's
6 motion.

7 COMMISSIONER SCHOENFELDER: Mr. Chairman, I
8 have a motion. I think you've run through some of
9 this. We did hold a hearing but the Commission had
10 before it a motion by AT&T Communications of the
11 Midwest, Inc., to disapprove the application of U S
12 West, Incorporated, to increase switched access charges
13 and to close this docket, this docket being TC96-107.

14 The motion was concurred in by the TAC group
15 and Sprint. We held a hearing on this matter on
16 October 9th and 10th in 1996, and on December 9th,
17 1996, and a majority of the Commission moved to reopen
18 the record for the taking of more evidence.

19 The Commission felt that the record was
20 inadequate in several respects. A hearing for taking
21 this additional evidence has been set for March 1997
22 through March 21st, 1997.

23 On January 6th, 1997, U S West informed this
24 Commission and the intervenors that it intends to
25 implement its rate increase in accordance with 2061

49-31-21.4 on January 8th, 1997.

We held a hearing on the motion of AT&T on January 23rd, 1997, and considered the parties' arguments. At this hearing counsel for U S West stated that he was happy with the record as it had been developed. This was represented to the Commission on several occasions.

This motion to disapprove the increase and close the docket has brought this whole matter to the front burner. I am still not satisfied that there is enough reliable evidence, and it is apparent that U S West is not interested in presenting anything further to this Commission.

It is the public that ultimately pays when there are increases like this one. And our job is to protect that public, while assuring that a utility, that it has been reasonably compensated for its services.

I don't think that public interest would be served, nor would this Commission be (INAUDIBLE) if we approved the rate increase with what has been presented to us up to this point in time.

With this in mind, I am moving that AT&T's motion be granted in its entirety and that the Commission

of Fact and Conclusions of Law be issued consistent
with this motion. That's my motion, Mr. Chairman.

THE CHAIRMAN: This is Commissioner Burg. I
will concur with this motion and in doing so agree that
I am disappointed in the quality of the case that has
been presented to this Commission. It is incumbent on
us, the decision maker, to address the substance of
this docket based on which has been presented to the

At the January 23rd meeting, last meeting,
the major players indicated that they want a decision
now, even though I was willing to listen to some
testimony. I am persuaded that the motion to
disapprove U S West's application and close the docket
has merit and the public interest demands it be granted
and I concur in the motion.

Commissioner Nelson.

COMMISSIONER NELSON: Mr. Chairman, thank
you. I would like the record to reflect to show that
-- or indicate that I'm sustaining from voting on this
motion as I have not sat in on the hearings in this
case and I was not Commissioner at the time.

THE COURT: Thank you. If nothing more to
come before the Commission, that will conclude this
hearing. Do we need anything else? Thank you.

(THE HEARING CONCLUDED.)

STATE OF SOUTH DAKOTA)


)

COUNTY OF HUGHES)

I, Lori J. Grode, RMR, a Notary Public in and for the County of Hughes and State of South Dakota, do hereby certify that the above hearing, pages 1 through 7, inclusive, was reduced to typewriting by me.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Pierre, South Dakota, this 31st day of January, 1997.



Lori J. Grode, RMR
Registered Merit Reporter
Notary Public

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT
OF SWITCHED ACCESS RATES FOR U S
WEST COMMUNICATIONS, INC.

) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) ORDER AND NOTICE OF
) ENTRY OF ORDER
) TC96-107

On June 24, 1996, U S WEST Communications, Inc. (U S WEST) filed for approval by the Public Utilities Commission (Commission) its 1995 switched access cost study. According to the Commission, the study develops an overall average calculated rate of \$0.066 per minute required to recover the costs.

On June 27, 1996, the Commission electronically transmitted notice of the filing and the intervention deadline of July 12, 1996, to interested individuals and entities. The following intervenors were granted intervention on July 30, 1996: Sprint Communications Company L.P. (Sprint), MCI Telecommunications Corporation (MCI), Express Communications Company L.P. (Express), AT&T Communications of the Midwest, Inc. (AT&T), Telecommunications Action Group (TAG), and Dakota Cooperative Telecommunications, Inc. (DCT). The Commission also found that pursuant to SDCL 49-31-12.4, the rate increase should be suspended for 120 days.

A hearing was held on October 9 and 10, 1996, before the Commission. At a regularly scheduled meeting of the Commission on December 9, 1996, Commissioner Schoenfelder moved to reopen the record for the taking of more evidence. The motion was seconded by Commissioner Burg with Chairman Stofferahn dissenting. The hearing was set to continue on March 19, 1997, through March 21, 1997.

On January 16, 1997, AT&T moved the Commission to (1) disapprove the application of U S WEST for an increase in switched access rates and (2) to close this docket. A hearing on this motion was held before the Commission on January 23, 1997. Commissioner Nelson did not participate in these proceedings. At an ad hoc meeting on January 27, 1997, the Commission granted the motion of AT&T. Commissioner Nelson abstained from voting on this motion.

Based on the record in this matter, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1

On June 24, 1996, U S WEST filed for approval by the Commission its 1995 switched access cost study. The application indicated that the cost study develops an overall average calculated rate of \$0.066 per minute required to recover the costs of providing switched access. Switched access rates are charges made by U S WEST to other telecommunications companies for access to U S WEST exchanges.

II

Switched access rates are determined in accordance with a computer model developed by the Commission (Transcript 10,11), the terms of which are specified in Commission rules, ARSD Chapters 20:10:27 through 20:10:29, inclusive. A cost study must be filed with the Commission no less than every three years, ARSD 20:10:27:07/

III

Switched access rates result from information in the form of numerical data which is supplied into the Commission's computer model (Transcript 10). This information which is supplied is commonly referred to as "inputs." The end product is called a cost study.

IV

At the hearing before the Commission on October 9 and 10, 1996, U S WEST, through its witness Wayne G. Culp, introduced its cost study into evidence (Exhibit 3, Transcript 10).

V

The enhanced revenue to U S WEST would be in the range of 6 to 6.5 million dollars if the Commission approved U S WEST's cost study and the rates which U S WEST submits that it supports (Transcript 92).

VI

U S WEST witness Wayne G. Culp did not personally develop any of the figures that went into the cost study (Transcript 90); he acted in a supervisory capacity (Transcript 89). The model was actually run by other U S WEST employees (Transcript 89, 90). Witness Wayne G. Culp testified on behalf of U S WEST that these inputs were the truth (Transcript 92).

VII

Commission staff witness Robert Knadle's analysis of adjustments to inputs to the cost study made by U S WEST was based upon work papers that U S WEST furnished to data requests from staff. The responses of U S WEST were not supplied under oath and to his belief the numbers were checked by staff witness Harlan Best with reports that Harlan Best received (Transcript 107,108).

VIII

Commission staff witness Harlan Best's analysis of the cost study involved no verification of information that was contained in the reports upon which he relied to verify the cost model inputs. It was his belief that U S WEST's external auditors audited U S WEST's ledgers for the report. He did not inspect U S WEST's ledger or perform any random sampling of U S WEST's ledger entries used as inputs to the cost study (Transcript 124, 125,126).

IX

Commission staff witness Gregory Rislov did not perform any validation tests of numbers that U S WEST supplied nor did he perform any direct inspection of U S WEST's records (Transcript 154, 155, 156).

X

AT&T witness Patricia A. Parker analyzed U S WEST's cost study and pointed to deficiencies in that cost study or areas that needed verification; those deficiencies or areas that needed verification included:

- a. whether U S WEST has included costs that are not related to the provisioning of basic access services;
- b. adjustments made to the inputs including salary, employee level, inflation adjustments in the base and process improvement cost were questionable;
- c. whether the rate of return on investment was improperly raised;
- d. adjustments for recent sales of U S WEST exchanges had not been met and appeared to use forecasted data;
- e. an increasing in U S WEST's costs by shortening its depreciation lives while not making an adjustment for a rate increase it was granted; and
- f. U S WEST's data was unaudited (prefiled testimony of Patricia A. Parker, Exhibit 3, 4 through 7).

XI

FirTel President Fred L. Thurman, a certified public accountant, questioned U S WEST's use of proceeds from a prior sale of 55 rural South Dakota exchanges and how they impact this cost study. (Prefiled testimony, Exhibit 12, 3; Transcript 204 through 206). The switched access charges of U S WEST are approximately 50 percent of FirTel's direct costs and as proposed would approximate a 100% increase in those costs (Transcript 189, 190). FirTel would not be able to absorb this cost and it would be difficult for it to pass it on to customers due to the terms of their customer contracts (Transcript 189). Fred L. Thurman did not present specific evidence or express an opinion as to what he thought the switched access rate should be other than to say that a reasonable increase would be 10% or 15% (Transcript 202).

XII

Tele-Tech, Inc., witness Jerry R. Noonan, a practicing certified public accountant and majority stockholder of Tele-Tech, Inc., testified that the proposed switched access rate increase by U S WEST would eliminate his company from the marketplace (prefiled testimony, Exhibit 10, 2). These switched access charges represent approximately 60% of his company's direct business costs (Transcript 224). Jerry R. Noonan did not present specific evidence or express an opinion as to what he thought the switched access rate should be as a result of the cost study filed in this docket other than to recommend that it should stay at its present \$.0314 plus inflation pending the full implementation of the Telecommunications Act of 1996 (Transcript 228, 229).

XIII

Midco Communications general manager Tom Simmons testified that his company does not have the wherewithal to absorb the cost of the proposed switched access rate, it would represent a 100% increase and that his contracts with associations to provide telecommunications services to them only permit a 10% yearly increase in rates (Transcript 232 through 234). Midco employs 84 people (Transcript 242).

XIV

TCIC Communications witness Dennis Law testified that U S WEST's proposed switched access charge would represent a 108.4% increase to his company for such costs, that such charges represented approximately 50% of TCIC Communications' direct operating costs, 90% of their business originates in South Dakota and that they employed 25 full and part time employees (Transcript 248,253). Dennis Law did not present specific evidence or express an opinion as to what he thought the switched access rate should be.

XV

Tel Serv Telecommunications witness Susan Cook testified that U S WEST's proposed switched access increase would represent an increase of 124% in current switched access charges to her company. For increases in excess of 10%, their customers are allowed out of their contracts with Tel Serv Telecommunications. As to the increase, if allowed, she was unsure where Tel Serv Telecommunications would reallocate the costs (Transcript 256, 258). Susan Cook did not present specific evidence or express an opinion as to what she thought the switched access rate should be.

XVI

Sprint Communications Company Joni P. Siplon testified that the proposed switched access rate would represent an increase in switched access charges of approximately 112% to her company (prefiled testimony, Exhibit 7, 2). Joni P. Siplon did not present specific evidence or express an opinion as to what she thought the switched access rate should be.

XVII

Using the Commission's cost model, U S WEST's testimony was that the switched access charge was approximately 6.4 cents per minute of use (prefiled testimony Exhibit 3, 1). Staff's finding was 6.15 cents per minute of use (prefiled testimony, Exhibit 4, 5). At the hearing, U S WEST testified that it would "accept" staff's position (Transcript 11). U S WEST's rebuttal witness Wayne G. Culp put bounds around AT&T witness Patricia A. Parker's testimony (Transcript 331). He further testified on cross-examination while he did not agree with witness Parker's calculation or assertions, the rate would be approximately 5.55 cents per minute of use if her assertions were correct (Transcript 329, 330).

XVIII

The Commission on December 9, 1996, Commissioner Stofferahn dissenting, voted to reopen the record for purposes of taking further evidence. The grounds for this motion were: (1) depreciation was inadequately explained and unresolved was whether or not it should be included in the cost model; (2) there was a lack of quantification by small resellers of the effect of the proposed rate increase on their membership; (3) small resellers had not presented alternatives to the cost model results; (4) concern over the affect of the size of the rate increase on small South Dakota resellers; and (5) a lack of verification of numbers which went into the cost model (Transcript of December 9, 1996 proceeding). The Commission issued a procedural order on January 10, 1997, setting the continuance of the hearing for March 19 through 21, 1997.

XIX

On January 6, 1997, U S WEST wrote a letter to the Commission informing it that U S WEST intended to exercise its statutory rights and implement its new rates on January 28, 1997.

XX

On January 16, 1997, AT&T moved the Commission to (1) disapprove the application of U S WEST for the increase in switched access rates and (2) close the existing docket

XXI

On January 23, 1997, the Commission held a hearing on AT&T's motion, described in Finding XX, above.

XXII

At the hearing described in Finding XXI, above, U S WEST indicated to the Commission through its counsel of record that it was comfortable with the record, did not want to open it, that it was time for a decision and that it intended to implement its rate increase (January 23, 1997 proceeding Transcript 14, 29, 35). AT&T through its counsel of record indicated that it is time for a decision (January 23, 1997 proceeding Transcript 17).

XXIII

U S WEST's proposed switched access rates are not in the public interest.

XXIV

Inputs into the Commission's computer model must be accurate and reliable as the Commission's computer model produces a mathematical result which is entirely dependent upon inputs into it.

XXV

Inputs into U S WEST's cost study have not been adequately verified.

XXVI

U S WEST has not met its burden of proof that its switched access rate which is the subject of this docket is fair and reasonable.

XXVII

The switched access rate which is the subject of this docket is not fair and reasonable.

XXVIII

The record in this docket does not sustain U S WEST's request for a switched access rate increase.

XXIX

U S WEST's cost study (attached to Wayne G. Culp's testimony, Exhibit 3) shall be given no evidentiary weight.

XXX

U S WEST's witness Wayne G. Culp lacks credibility and his testimony shall be given no evidentiary weight.

CONCLUSIONS OF LAW

I

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31 and ARSD Chapters 20:10:27 through 20:10:29, inclusive.

II

This is a contested case under SDCL Chapter 1-26.

III

Pursuant to SDCL 49-31-12.4(3), U S WEST has the burden to prove that its proposed switched access rate is fair and reasonable.

IV

On issues of fact, the Commission may judge the credibility of witnesses and give appropriate weight to the testimony of each of them, including the reasonableness of the testimony when it is considered in the light of all evidence in the case. It may also give appropriate weight to evidence other than testimony which has been received.

V

The determination of the public interest is the function of the Commission and what it views as the public interest may change with or without a change in circumstances.

VI

U S WEST has not met its burden of proving that its proposed switched access rate is fair and reasonable.

VII

U S WEST's proposed switched access rate is not fair and reasonable.

VIII

The implementation of U S WEST's proposed switched access rate is not in the public interest.

IX

The Motion of AT&T shall be granted

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore

ORDERED that U S WEST's application for an increase in switched access rates in this ~~case~~ ~~case~~ be denied and it is further

ORDERED that this docket be closed.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 31st day of January, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 31st day of January, 1997.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this matter, as listed on the docket herein, by hand or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
<u>Melvin Kalks</u>	
<u>1/31/97</u>	
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

PAM NELSON, Commissioner
(did not participate in this decision)

Accepted
5/29/97

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF HUGHES)

SIXTH JUDICIAL
CIRCUIT

U S WEST COMMUNICATIONS, INC.

CIV. 97-50

Appellant,

ORDER OF REMAND

v.

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA

Appellee.

This matter came on for a hearing before the Honorable Steven L. Zinter, at the Hughes County Courthouse, Pierre, South Dakota, on May 16, 1997. The Appellant, U S WEST Communications, Inc. ("U S WEST"), appeared through its attorneys, Thomas J. Welk and Tamara A. Wilka. The Appellee appeared through Cannon Housh. The following Intervenor appeared through their respective counsel: Sprint Communications Company L.P., Thomas H. Harmon; MCI Telecommunications Corporation, Robert K. Sato; AT&T Communications of the Midwest, Inc. ("AT&T"), John S. Lovell; Telecommunications Action Group, Robert C. Ritter and David Phillips. The Court has considered and reviewed the entire record in this proceeding including the briefs submitted by counsel, as well as the oral arguments. In addition, the Court entered an oral bench decision on May 16, 1997. Now, therefore, it is

ORDERED that the Findings of Fact and Conclusions of Law, Order and Notice of Entry of Order dated January 31, 1997 entered in The Matter of the Establishment of Switched Access Rates for U S West Communications, Inc. (TC96-107) of the South Dakota Public Utilities Commission ("the Commission") granting AT&T's motion to deny U S WEST's switched access rate increase and to close the docket is reversed and remanded pursuant to SDCL 1-26-36 on the grounds stated in the Court's oral bench decision which is incorporated by reference as if specifically set out herein. It is

FURTHER ORDERED that the Commission, pursuant to SDCL 49-31-12.4(4), shall determine forthwith a fair and reasonable switched access rate for U S WEST and render a written decision specifically setting out the rate and prepare a record of its proceedings and findings.

Dated this ___ day of May, 1997

BY THE COURT

Honorable Steven L. Zimes
Circuit Court Judge

ATTEST:

Mary L. Erickson
Clerk of Courts

BY _____
Deputy

(SEAL)

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Joseph D. Murphy
Russell R. Greenfield
David J. Vichon
Gary J. Finkley
Vance R.C. Goldammer
Thomas J. Walk
Terry N. Wynderup
James R. McMahon
Dwight J. Hatch
Michael S. McCright
Craig S. Greenfield
Thomas A. Wilke
Roger A. Stuckert
Cynthia A. Thompson
Lisa Hansen Moore

Northwest Center, Suite 600
101 North Phillips Avenue
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 334-2424
Facsimile 605 334-0418

cc: [illegible]
[illegible]

cc: [illegible]
[illegible]

May 29, 1997

Camron Hoseck, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

John Lovald
Olinger, Lovald, Robbenolt &
McCahren P.C.
117 East Capitol Avenue
Pierre, SD 57501

David A. Gerdes
Robert K. Sahr
May, Adam, Gerdes & Thompson
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

Richard P. Tietzen
Thomas H. Harmon
Tietzen Law Office
222 East Capitol Avenue
P.O. Box 626
Pierre, SD 57501

Robert G. Marnett
Marnett and Armstrong
P.O. Box 269
Centerville, SD 57014

David Pfeiffer
Robert C. Riser
Riser, Mayer, Hofer, Welter & Brown
P.O. Box 280
Pierre, SD 57501


Re: U S West Communications, Inc. v. Public Utilities Commission of South Dakota
Docket No. TC96-107

Dear Counsel:

Please find enclosed a copy of the Notice of Entry of Order of Remand. This is intended as service upon you via facsimile.

Sincerely yours,

**BOYCE, MURPHY, McDOWELL
& GREENFIELD, L.L.P.**


THOMAS A. WILKE

TAW/vjj
Enclosure
cc: William P. Heaston
Jon Lehner

STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

)
:SS
)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

U S WEST COMMUNICATIONS, INC.

CIV. 97-30

Appellant

NOTICE OF ENTRY
OF ORDER

v.

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA

Appellee.

TO: PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA AND CAMRON HOSECK, STAFF COUNSEL OF THE COMMISSION; RICHARD TIESZEN AND THOMAS H. HARMON, COUNSEL FOR SPRINT COMMUNICATIONS COMPANY L.P.; DAVID GERDES AND ROBERT K. SAHR, COUNSEL FOR MCI TELECOMMUNICATIONS CORPORATION; JOHN S. LOVALD, COUNSEL FOR AT&T COMMUNICATIONS OF THE MIDWEST, INC.; DAVID A. PFEIFLE AND ROBERT C. RITER, COUNSEL FOR TELECOMMUNICATIONS ACTION GROUP; and ROBERT MARMET, COUNSEL FOR DAKOTA COOPERATIVE TELECOMMUNICATIONS, INC.

Notice is hereby given that an Order of Remand, a copy of which is attached hereto, was entered and filed by the Court on the 27th day of May, 1997, in the office of the Clerk of Courts of Hughes County.

Dated this 28th day of May, 1997.


Tamara A. Wilka

BOYCE MURPHY, MCDOWELL
& GREENFIELD

P.O. Box 5015

Sioux Falls, SD 57117-5015

Telephone: (605) 336-2424

Attorneys for Appellant

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)

:SS

IN CIRCUIT COURT
SIXTH JUDICIAL
CIRCUIT

U S WEST COMMUNICATIONS, INC.)

CIV. 97-50

Appellant,)

ORDER OF REMAND

v.)

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA)

Appellee.)


This matter came on for a hearing before the Honorable Steven L. Zinter, at the Hughes County Courthouse, Pierre, South Dakota, on May 16, 1997. The Appellant, U S WEST Communications, Inc. ("U S WEST"), appeared through its attorneys, Thomas J. Welk and Tamara A. Wilka. The Appellee appeared through Camron Hoesek. The following Intervenor appeared through their respective counsel: Sprint Communications Company L.P., Thomas H. Harmon; MCI Telecommunications Corporation, Robert K. Sehn; AT&T Communications of the Midwest, Inc. ("AT&T"), John S. Levald; Telecommunications Action Group, Robert C. Riter and David Pfeifle. The Court has considered and reviewed the entire record in this proceeding including the briefs submitted by counsel, as well as the oral arguments. In addition, the Court entered an oral bench decision on May 16, 1997. Now, therefore, it is

ORDERED that the Findings of Fact and Conclusions of Law, Order and Notice of Entry of Order dated January 31, 1997 entered in The Matter of the Establishment of Switched Access Rates for U S West Communications, Inc. (TC96-107) of the South Dakota Public Utilities Commission ("the Commission") granting AT&T's motion to deny U S WEST's switched access rate increase and to close the docket is reversed and remanded pursuant to SDCL 1-26-36 on the grounds stated in the Court's oral bench decision, which is incorporated by reference as if specifically set out herein. It is

FURTHER ORDERED that the Commission, pursuant to SDCL 49-31-12.4(4), shall determine forthwith a fair and reasonable switched access rate for U S WEST and render a written decision specifically setting out the rate and prepare a record of its proceedings and findings.

Dated this 27 day of May, 1997.

BY THE COURT:


Honorable Steven A. Zinter
Circuit Court Judge

ATTEST:

Mary L. Erickson
Clerk of Courts

BY: 
Deputy

(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, JUDICIAL CIRCUIT 6
FILED

MAY 27 1997


Mary L. Erickson
Clerk of Courts

CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 28th day of May, 1997, I sent a true and correct copy of the Notice of Entry of Order of Remand, together with a copy of said Order, to the following via facsimile:

Cameron Hoseck, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

John S. Lovald
Ollinger, Lovald, Robbenolt &
McCahren P.C.
117 East Capitol Avenue
P.O. Box 66
Pierre, SD 57501

David A. Gerdes
Robert K. Sahr
May, Adam, Gerdes & Thompson
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
222 E. Capitol Avenue
P.O. Box 626
Pierre, SD 57501

Robert G. Marnet
Marnet & Armstrong
P.O. Box 269
Centerville, SD 57014

David Pfeifle
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501


Tamara A. Wilka

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Norwest Center, Suite 600
101 North Phillips Avenue
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1962)

May 29, 1997

FAX Received MAY 29 1997

RECEIVED

JUN 02 1997

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Mary L. Erickson, Clerk
Hughes County Clerk of Courts
P.O. Box 1112
Pierre, SD 57501

Re: U S West Communications, Inc.. v. Public Utilities Commission of South Dakota
Civ 97-50
Our File No. 2104-96-107

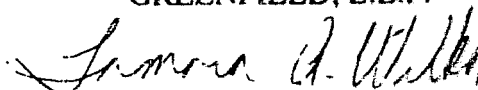
Dear Ms. Erickson:

Please find enclosed for filing the original Amended Certificate of Service of Notice of Entry of Order of Remand in connection with the above referenced.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.



Tamara A. Wilka

TAW/vj
Enclosures

cc: All Counsel
William Heaston
Jon Lehner

RECEIVED

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)
:SS

IN CIRCUIT COURT JUN 02 1997
SOUTH DAKOTA PUBLIC
SIXTH JUDICIAL CIRCUIT UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.

CIV. 97-50

Appellant,

AMENDED CERTIFICATE
OF SERVICE

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA

Appellee.

FAX Received JUN 29 1997

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 29th day of May, 1997 at 12:05 p.m., I sent a true and correct copy of the Notice of Entry of Order of Remand, together with a copy of said Order, to the following via facsimile to the following numbers and via US mail, postage prepaid, to the following addresses:

Cannon Huseck
Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

773-3809

Richard P. Tieszen 224-1600
Thomas H. Harmon
Tieszen Law Office
222 East Capitol Avenue
P.O. Box 626
Pierre, SD 57501

John S. Lovald
Chinger, Lovald, Robbenolt
& McCahren P.C.
117 East Capitol Avenue
Pierre, SD 57501

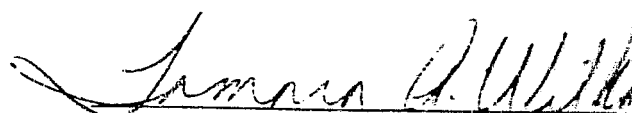
224-8269

Robert G. Marmet 263-3995
Marmet and Armstrong
P.O. Box 269
Centerville, SD 57014

David A. Gerdes
Robert K. Schr
Mayer, Adam, Gerdes & Thompson
103 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

224-6289

David Pfeifle 224-7102
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501


Tamara A. Wilka

RECEIVED

MAY 30 1997

STATE OF SOUTH DAKOTA) SOUTH DAKOTA PUBLIC UTILITIES COMMISSION IN CIRCUIT COURT
) SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

U S WEST COMMUNICATION, INC.,

CIV. NO. 97-50

Appellant,

~~VS~~

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA,

Appellee.

AMENDED
ORDER OF REMAND

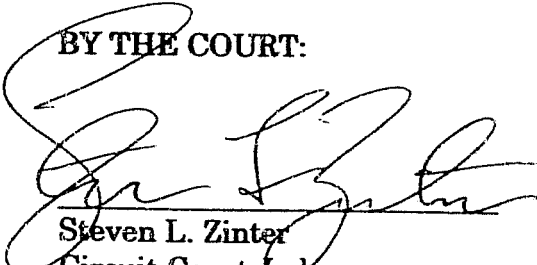
This matter came on for a hearing before the Honorable Steven L. Zinter, at the Hughes County Courthouse, Pierre, South Dakota, on May 16, 1997. The Appellant, U S West Communications, Inc. (U S West), appeared through its attorneys, Thomas J. Welk and Tamara A. Wilka. The Appellee appeared through ~~Carmen Houck~~. The following Intervenor appeared through their respective ~~counsel~~: Sprint Communications Company L.P., Thomas H. Harmon; MCI Telecommunications Corporation, Robert K. Sahr; AT&T Communications of the Midwest, Inc. (AT&T), John S. Lovald; Telecommunications Action Group, Robert C. Eiter and David Pfeifle. The Court has considered and reviewed the entire record in this proceeding including the briefs submitted by counsel, as well as the oral arguments. In addition, the Court entered an oral bench decision on May 16, 1997. Now, therefore, it is hereby

ORDERED that the Order and Notice of Entry of Order dated January 31, 1997 entered in The Matter of the Establishment of Switched Access Rates for U S West Communications, Inc. (TC 96-107) of the south Dakota Public Utilities Commission (the Commission) granting AT&T's motion to deny U S West's switched access rate increase and to close the docket is reversed and remanded pursuant to SDCL 1-20-36 on the grounds stated in the Court's oral bench decision, which is incorporated by reference as if specifically set out herein. It is further

ORDERED that the Commission, pursuant to SDCL 49-31-12.4(4) shall determine forthwith a fair and reasonable switched access rate for U S West and render a written decision specifically setting out the rate and prepare a record of its proceedings and findings.

Dated this 29th day of May, 1997.

BY THE COURT:


Steven L. Zinter
Circuit Court Judge

ATTENT:


Mary L. Erickson
County Clerk
Dakota

(SEAL)

(X) Counsel of Record

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Norwest Center, Suite 600
101 North Phillips Avenue
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

May 29, 1997

RECEIVED

JUN 02 1997

James H. Heston, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

John L. Lovell
Chapman, Lovell, Robbenolt &
McClure P.C.
111 East Capitol Avenue
Pierre, SD 57501

David A. Gerdies
Robert E. Riter
Mayer, Adam, Gerdies & Thompson
501 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
222 East Capitol Avenue
P.O. Box 626
Pierre, SD 57501

Robert G. Marmet
Marmet and Armstrong
P.O. Box 269
Centerville, SD 57014

David Pfeifle
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

Re: *U S West Communications, Inc. v. Public Utilities Commission of South Dakota*
Docket No. TC'96-107

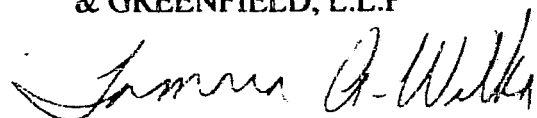
Dear Counsel:

Enclosed please find a copy of the Notice of Entry of Remand Order, together with a copy of the order which was faxed yesterday and again this morning. In reviewing SDCL 15-6-5, it does not appear that service by facsimile transmission is authorized. Accordingly, in an abundance of caution, I am reserving the enclosed.

This is intended as service by mail.

Sincerely yours,

BOYCE, MURPHY, McDOWELL
& GREENFIELD, L.L.P.


Tamara A. Wilka

Tamara A. Wilka
Enclosure
cc: William P. Heston
John L. Lovell

RECEIVED

STATE OF SOUTH DAKOTA

)
:SS

IN CIRCUIT COURT

JUN 02 1997

COUNTY OF HUGHES

)

SIXTH JUDICIAL CIRCUIT SOUTH DAKOTA PUBL.
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.

CIV. 97-50

Appellant.

NOTICE OF ENTRY
OF ORDER

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA

Appellee.

FAX Received MAY 29 1997

TO: PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA AND
CAMRON HOSECK, STAFF COUNSEL OF THE COMMISSION; RICHARD TIESZEN
AND THOMAS H. HARMON, COUNSEL FOR SPRINT COMMUNICATIONS
COMPANY L.P.; DAVID GERDES AND ROBERT K. SAHR, COUNSEL FOR MCI
TELECOMMUNICATIONS CORPORATION; JOHN S. LOVALD, COUNSEL FOR
AT&T COMMUNICATIONS OF THE MIDWEST, INC.; DAVID A. PFEIFLE AND
ROBERT C. RITER, COUNSEL FOR TELECOMMUNICATIONS ACTION GROUP; and
ROBERT MARMET, COUNSEL FOR DAKOTA COOPERATIVE
TELECOMMUNICATIONS, INC.

Notice is hereby given that an Order of Remand, a copy of which is attached hereto, was
entered and filed by the Court on the 27th day of May, 1997, in the office of the Clerk of Courts of
Hughes County.

Dated this 28th day of May, 1997.



Tamara A. Wilka
BOYCE, MURPHY, MCDOWELL
& GREENFIELD
P.O. Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424

Attorneys for Appellant

MAY 1997

STATE OF SOUTH DAKOTA)

COUNTY OF HUGHES)

:SS

IN CIRCUIT COURT

SIXTH JUDICIAL
CIRCUIT

U S WEST COMMUNICATIONS, INC.)

CIV. 97-50

Appellant,)

ORDER OF REMAND

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA)

Appellee.)

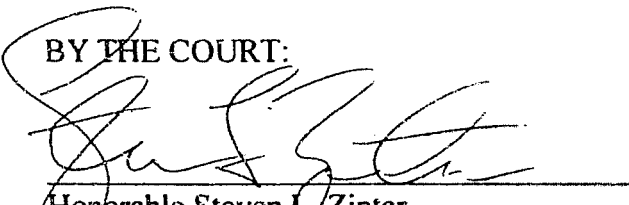
This matter came on for a hearing before the Honorable Steven L. Zinter, at the Hughes County Courthouse, Pierre, South Dakota, on May 16, 1997. The Appellant, U S WEST Communications, Inc. ("U S WEST"), appeared through its attorneys, Thomas J. Weik and Tamara A. Wilka. The Appellee appeared through Camron Hoseck. The following intervenors appeared through their respective counsel: Sprint Communications Company L.P., Thomas H. Harmon; MCI Telecommunications Corporation, Robert K. Sahr; AT&T Communications of the Midwest, Inc. ("AT&T"), John S. Lovald; Telecommunications Action Group, Robert C. Riter and David Pfeifle. The Court has considered and reviewed the entire record in this proceeding including the briefs submitted by counsel, as well as the oral arguments. In addition, the Court entered an oral bench decision on May 16, 1997. Now, therefore, it is

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Dated this 27 day of May, 1997.

BY THE COURT:


Honorable Steven L. Zinter
Circuit Court Judge

ATTEST:

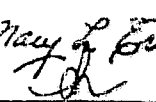
Mary L. Erickson
Clerk of Courts

By Maureen McEntaffer


(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED

MAY 27 1997

By Mary L. Erickson Clerk


CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 28th day of May, 1997, I sent a true and correct copy of the Notice of Entry of Order of Remand, together with a copy of said Order, to the following via facsimile:

Cameron Hoseck, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

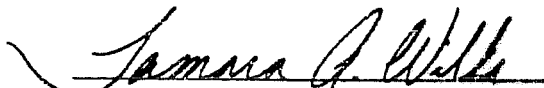
John S. Lovald
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117 East Capitol Avenue
P.O. Box 66
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Robert K. Sahr
May, Adam, Gerdes & Thompson
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P.O. Box 160
Pierre, SD 57501-160

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Thomas H. Harmon
Tieszen Law Office
222 E. Capitol Avenue
P.O. Box 626
Pierre, SD 57501

Robert G. Marmet
Marmet & Armstrong
P.O. Box 269
Centerville, SD 57014

David Pfeifle
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501


Tamara A. Wilka

APPEARANCES, CONT'D:

Counsel for AT&T

JOHN S. LOVALD, ESQ.
Olinger, Lovald, Robbennolt &
McCahren, PC
Post Office Box 66
Pierre, South Dakota 57501-0066

Counsel for MCI:

ROBERT K. SAHR, ESQ.
May, Adam, Gerdes & Thompson, LLP
Post Office Box 160
Pierre, South Dakota 57501-0160

Counsel for TAG:

ROBERT C. RITER, JR., ESQ.
DAVID A. PFEIFLE, ESQ.
Post Office Box 280
Pierre, South Dakota 57501-0280

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1 THE COURT: All right. Let's have counsel make their
2 appearances starting with Mr. Harmon.

3 MR. HARMON: Tom Harmon, Tieszen Law Office for
4 Sprint.

5 MR. HOSECK: Camron Hoseck with the Public Utilities
6 Commission. And I have appearing with me today my legal
7 intern, Trisha Zimmer, from Parker, South Dakota.

8 THE COURT: Okay.

9 MS. WILKA: Tami Wilka from Boyce, Murphy.

10 MR. WELK: Tom Welk from Boyce, Murphy representing
11 US West Communications. We also have appearing today,
12 your Honor, Robin Bittner, B-I-T-T-N-E-R, a legal intern
13 in our office who is here to watch the proceedings.

14 MR. RITER: Bob Riter for the Telecommunications
15 Action Group along with David Pfeifle of our office.

16 MR. LOVALD: John Lovald from the Olinger Law Firm on
17 behalf of AT&T.

18 MR. SAHR: Bob Sahr of May, Adam, Gerdes and Thompson
19 representing MCI.

20 THE COURT: Okay. Counsel, any preliminary matters?
21 If not, then Mr. Welk or Ms. Wilka, who's going to
22 argue?

23 MR. WELK: Thank you, your Honor. Good morning,
24 counsel.

25 Your Honor, this proceeding presents an opportunity

1 for judicial review under 1-26-36 of the Commission's
2 decision on US West's application for an increase in
3 switched access rates. As the briefs reflect, switched
4 access rates are the rates that US West charges long
5 distance telephone carriers to use US West facilities.

6 I'm not going to go into many of the points in the
7 brief. I will highlight, however, one of the points that
8 I'd like to talk about that really didn't get a lot of
9 explanation in the briefs, which was standard of review.
10 And I would like to talk about that because I know it's
11 important to the Court and it's important to the record.

12 The parties have cited a number of cases that talk
13 about what the applicable standard of review is. However,
14 how the parties apply those standards of review to the
15 facts in the record below has not been very clear. US
16 West believes that a de novo standard of review exists as
17 to this record. This is so because the Court's review is
18 that of analyzing, in our view, a mixed question of law
19 and fact. There is no question that under South Dakota
20 settled law that conclusions of law are fully reviewable.

21 We believe that a mixed question of law and fact
22 exists because US West challenges the Commission's
23 decision on how it applied the evidence to rules enacted
24 by the Commission on how it computes switched access.

25 In reviewing back on preparation for the argument.

1 the South Dakota Supreme Court cases on looking how you
2 define a mixed question of law and fact, I return back to
3 the sentinel case of Permenn that really started the
4 analysis of the various types of review that the circuit
5 courts have. In the Permenn case, which has been cited
6 ad nauseam by all courts, the Supreme Court, Circuit
7 Courts and the parties, the South Dakota Supreme Court did
8 talk about how you define what a mixed question of law and
9 fact was. And what Permenn talked about and said was
10 that a mixed question of law and fact existed when you --
11 the Court applied law to facts to determine about
12 underlying values as to legal principles. And that was
13 the analysis that the Court gave in Permenn.

14 In this case, we are looking at how the Commission
15 used evidence to apply to the rules that existed. And in
16 Permenn, if you went back and looked at the case and
17 looked at what the Supreme Court said the mixed question
18 was, in Permenn the Supreme Court said the mixed
19 question in that case was whether this particular person
20 had appropriately sought unemployment compensation
21 benefits by looking for other employment. And the Court
22 said on -- when you look at whether they applied it in the
23 proper manner and looked for employment in light of the
24 regulations, that became a mixed question and therefore,
25 de novo review was applicable.

1 We've also cited in our briefs the recent cases --
2 Beerman v. Beerman and Fiegen which held -- they were
3 not administrative law cases, but which held in instances
4 where trial courts seek to apply a legal standard to the
5 evidence, a mixed question of law exists.

6 So we suggest respectfully, your Honor, that the
7 questions before the Court today are mixed. Other parties
8 will argue that the clearly erroneous standard applies and
9 under that test, as the Court is well aware of, and the
10 Court has written many times on this, the issue is whether
11 there's substantial evidence to support the Commission's
12 finding. We believe that no matter what standard you
13 apply, the Commission's decision should be reversed.

14 THE COURT: Well, even if it is a mixed question,
15 when you look at the statute 12.4(4), it says after any
16 hearing the Commission shall determine a fair and
17 reasonable rate. It seems to me that ultimately that's a
18 fact question.

19 MR. WELK: It may be in most instances, but on this
20 record, I will argue later that that is not necessarily so
21 because of the Commission's rules.

22 And why I say that, your Honor, is that this -- if
23 you look carefully at what happened in this case, and the
24 findings were made by the Commission seek to blanket its
25 decision on a credibility determination, this is not a

1 case where the Commission heard witness A and then witness
2 B and made a determination. It's not a case also where US
3 West came in like, for example, in a rate proceeding and
4 said, here are all our costs, here are all our numbers and
5 look at it and this is a fair and reasonable rate. That
6 is not this case.

7 THE COURT: Except that they do have the right to
8 disbelieve Culp if they want to.

9 MR. WELK: They have the right, but you got to ask
10 yourself why do you disbelieve Culp. That's the issue.
11 It's not because Culp wasn't credible. That's not -- I
12 believe that's where we have to cut to the number here.
13 They've said we don't believe Culp, but what did Culp do
14 but present numbers that were the company's numbers and
15 the computer cost model.

16 That's why this case is unique versus another rate
17 case. This had a Commission model. There is a prescribed
18 methodology. I mean, the people came and you put numbers
19 in the computer model, and the number is produced.

20 THE COURT: Except the -- I don't see anything in the
21 Commission's findings complaining or -- the Commission
22 uses the words "evidentiary shadow." I kind of like that.
23 But there's no shadow over the administrative rules over
24 the model. It's the inputs that we're talking about here.

25 MR. WELK: Let's get right to the numbers and the

1 shadow is in the inputs, but what is the disputed issue in
2 the inputs? In this record, the dispute is the rate
3 between 5.5 and 6.14. That's the dispute.

4 THE COURT: Well, are you willing to take 5.5?

5 MR. WELK: Yes. And we're willing to take 5.5. And
6 why, because --

7 THE COURT: It's 5.55, isn't it?

8 MR. WELK: 5.55. Those numbers do make a difference
9 when you multiply them by 5.55.

10 Why are we willing to do that? The reason, your
11 Honor, is next year it will be a year since we filed this
12 application. There is no reason that it needs to be
13 remanded back if you just take 5.55 because that's all the
14 record will support anyway if you gave all of AT&T's
15 criticisms, which we have said we don't believe them, if
16 you gave them to them that's the best the record will
17 sustain. And so that is why we're willing to take the
18 rate and move on.

19 THE COURT: I thought you were willing to accept
20 6.125.

21 MR. WELK: Well 6.14 is the rate we were willing at
22 the hearing to accept, the staff's adjustments.

23 THE COURT: But there's no record of you agreed to
24 take 5.55.

25 MR. WELK: No, there is not a record, but I have

1 talked to my client and I have asked because I anticipated
2 this question. And what -- why we want -- we'll take 5.55
3 and move on because of the delay that has occurred, your
4 Honor, in this proceeding.

5 You have to understand that we're the only ones that
6 want this rate. All the people in the courtroom, delay is
7 on their side. They don't want this rate. And we have
8 waited over a year and we figure that any additional
9 remand proceedings, unless you prescribe that they must be
10 back here in a certain period of time with a very limited
11 review, we will just take the rate and move on. That's
12 what my client has authorized me to state.

13 THE COURT: Why couldn't you -- this is something I
14 didn't quite understand. You attempted to unilaterally
15 implement and then they dismissed the case on you.

16 MR. WELK: Yes.

17 THE COURT: But why couldn't you -- you couldn't
18 unilaterally implement anyway?

19 MR. WELK: If we wanted to -- I suppose if we wanted
20 to play hard nose under the applicable law, but they
21 denied the rate application. If you look at the statute,
22 I think that they were required to enter an order and
23 that's what happened. The 180 days was approaching. They
24 then -- they then entered an order denying it. We would
25 have been going against the Commission's order and we

sought through this process of judicial review
rectification of that order.

THE COURT: Rather than stick your neck out and just
try to implement it and see if that subsection 5 allows
you to do that?

MR. WELK: We would rather do -- have this Court make
that decision. It would have been -- then we would have
been talking about refunds and the rates. So we're at
risk for revenue now that's not been ordered. That's why
we want a quick decision in this case.

THE COURT: But, you know, how can I -- at the very
best, your case is a remand, it seems to me, because am I
supposed to order 5.55 over 6.15? I don't think so.

MR. WELK: I knew you would ask that question. And
my answer is if we are willing to concede the 5.55 without
a remand, I don't think there's any error in that respect.
I can't disagree with you, your Honor, if you said I'm
going to remand this back and the rate ought to be between
these two numbers. I really can't in good conscience say
that that would be an error for the Court to do that.

But what I am concerned about is if you remand this
back and we have been through these proceedings, what will
be the limit of your remand? I mean, it ought to be
reversed and establish a rate between those two numbers
and not reopen the proceedings. Because if we get into

that we're going to be back here in several months again arguing about what ought to be in the remand proceeding.

So if you remand, it needs to be narrow, it needs to be defined, you know. I would like the remand order to say that within X number of days you need to enter a decision because there is no incentive for anybody but us to have an order entered so the rate is applicable.

THE COURT: But the Commission was obviously concerned with -- another phrase I like was "scrubbing the numbers." If they want to scrub the numbers they should have the right to do that, shouldn't they?

MR. WELK: They should have done that before the hearing.

THE COURT: I understand.

MR. WELK: That's the point.

THE COURT: As I read the record, what happened was they reopened the record to do that. You indicated you weren't going to unilaterally or voluntarily produce additional evidence and AT&T says, all right, you're toast and the Commission agreed. But they've got -- you know, they have broad investigatory powers. They can make you produce anything that you've got --

MR. WELK: Sure.

THE COURT: -- to scrub these numbers.

MR. WELK: They can do that, but they ought to give

us a rate while they're doing that.

We had a hearing -- we had this thing from June of '96 until October. If they want to go ahead and investigate numbers, order that. Your Honor, they can do that under their general powers. They can come back, they can come enter an order to show cause hearing.

But the problem is, your Honor, what they wanted to do was merely a facade to deny the rate application. I mean, first of all, the order that reopened the record, what did it say? It was going to be at the hearing. There was nothing in the order. There was a resolution that was passed by two commissioners. But if you read the order on reopening, there was nothing.

THE COURT: Well, oh, -- well, doesn't it -- I thought it incorporated the transcript or the --

MR. WELK: Well, I would like --

THE COURT: -- and it didn't. I have read so much. Maybe somebody said that in a brief.

MR. WELK: It's ordered that the record be reopened for purposes of taking additional evidence and the Commission's executive director work with the parties and establish a procedural schedule for further hearing in this docket.

It did talk about in the second paragraph at the meeting a motion was made that the record be opened and

1 Burg seconded and Stofferahn dissented. That's what's in
2 the order, which we're -- I think we're entitled to rely
3 on the order.

4 And our point, your Honor, and because I know that
5 that question is going to come up is why didn't we go back
6 and do that. The point -- issue, your Honor, at that
7 point in time was pointless. I mean, these rules either
8 mean something or they don't. And that's the real purpose
9 of this hearing. Do these rules that the Commission
10 enacted for every other company apply to US West and apply
11 fairly. That's the real issue here.

12 THE COURT: But shouldn't you have gone back and done
13 the scrubbing?

14 MR. WELK: Why? Why should we have to do that?

15 THE COURT: Well, the Commission didn't like -- they
16 had some -- obviously they were, according to their
17 findings, they had some questions about the verifiability
18 of some of the numbers that were being used.

19 MR. WELK: Let's talk about the issue of
20 verifiability. What are they saying they had a concern
21 about. What does the Commission want done, to have
22 numbers under oath, to have every person who entered a
23 transaction come before them?

24 Your Honor, I know you hear a lot of these
25 proceedings, but what you don't see, your Honor, is the

day by day interaction between these companies and the staff and the PUC. The way these proceedings work is that reports are filed with the PUC, the FCC. Books of account are used every day by the companies. And they are given to the staff, they're filed with the FCC, and these become the essential ingredients as to what people can rely on.

And remember under 1-26, the standard for evidence is preponderance and what a reasonably prudent person would rely on. At some point in time, your Honor, when the company comes forward and says, these are our books and records, these are what we filed with the FCC, we have met the burden of going forward and the burden of persuasion. And if somebody wants to believe that those are not accurate, the burden ought to shift to them. And AT&T and no one else is doing anything. They're just throwing harpoons up.

And I will tell you -- and you have never -- you have not heard this disputed by the Commission -- never in the history of the proceedings of the Commission has there been a requirement to have an independent audit. And in fact, the underlying data that you get to that's the subject of this, most of it was contained in the ARMIS reports -- A-R-M-I-S, an acronym. If FCC reports, which are where the formation comes -- the basis comes from an independent audit. That -- I don't know what more

companies can do if the Commission wants to go down and investigate and look at that, they can do that any time they want to. They clearly have the right to do it. But this was an evidentiary hearing. The time was then and there to make the decision.

And we think, your Honor, and I do want to comment because I believe that the staff in general -- we don't always agree with the staff of the PUC. We have a lot of disagreements, but in this case, the Commission chastised its own staff for doing what they have been doing through all some of the 20 years of employment that these people have worked. This is what they have done before, they did it for the Commission and there was no objection. So to automatically -- for the Commission to say out of the blue, gee, we want to look at the numbers that people have been relying on for years and years is patently unfair.

And the burden ought to shift to somebody else other than US West to show that there's a problem and there wasn't a problem. It's just what do we think the numbers ought to be. And that isn't what the administrative hearing ought to be. Somebody, if they had a problem, should have been at the hearing talking about those numbers.

AT&T, the only proponent of the criticism, didn't even run the model. I mean, you've got a computer model,

1 you put inputs in and they're sitting harpooning at the
2 hearing and they didn't even run the model. They had the
3 time to go down and do it and they didn't even quantify
4 their own criticisms. We had to do that in rebuttal.
5 That's where the difference between 6.14 and 5.5 comes,
6 and when it comes time for surrebuttal and that AT&T stand
7 up to say do you disagree with the numbers that -- as to
8 the criticisms, no evidence. They did not dispute that
9 taking all their criticisms produced a rate of 5.5. So
10 the only dispute at the hearing was between 6.14 and
11 giving AT&T every deference, 5.5. And so that's the real
12 dispute here.

13 But, your Honor, I want to talk about the rules. And
14 because the rules to me show what happened in this case.
15 Remember that the record establishes that these rules were
16 done in rule making hearing with most of the companies
17 that are in this proceeding there, not all of them because
18 TAG has a number of smaller companies that didn't
19 participate. But the big ones were all there. And the
20 Commission was faced with determining a methodology to
21 determine switched access rates. They didn't want to go
22 through these interminable hearings so they came up with a
23 uniform methodology. That's what the rule promulgation
24 process is for. We all went in; we made our arguments; we
25 all didn't like what happened, but the methodology was

1 produced in the rules. The rules are binding on the
2 Commission.

3 And I have looked forever -- at least in the last
4 couple of cases I've had up here -- for a South Dakota
5 Supreme Court case to say that the Commission is bound by
6 their own rulings. I haven't found it. I found a number
7 of other cases in other jurisdictions, but the PUC
8 concedes in its brief that it's bound by the rules.

9 But the PUC in its brief also states that -- and this
10 is what I found in incredible -- being bound by rules is
11 one thing, giving them any practical effect is quite
12 another. I don't know what that really means.

13 THE COURT: But you're talking about here application
14 of the rules. Nobody disputes -- there are no findings or
15 conclusions saying they don't like the model anymore.
16 Now, I read in the transcript before some of the
17 Commissioners thought maybe we should look at that again.

18 MR. WELK: That's fine.

19 THE COURT: But this is an application issue, not --
20 I don't see the Commission saying we don't want to follow
21 that rule anymore.

22 MR. WELK: Well, why didn't they follow the rules?

23 THE COURT: But the rules don't dictate the --

24 MR. WELK: Rate, no.

25 THE COURT: -- the rate or disputes about the inputs.

MR. WELK: That's correct. But in -- on this record -- and that's all you have before you -- what was the dispute? The dispute was between 6.4 and 5.55. That was the disputed issue. And I don't think any agency can just, on its own speculation, start creating evidentiary issues that don't exist. The record was there. They should have made the decision between those two rates.

Your Honor, I believe that the Findings of Fact and Conclusions of Law need to be reversed. And there's a number of reasons why some of these need to be reversed. Some are technical, some are substantive.

I submit that Findings of Fact VI through XVI need to be reversed for a technical reason. And that is those Findings talk about what particular witnesses testified to. And as this Court is well aware of, in the preparation of findings of fact, findings of fact are supposed to reflect ultimate facts not evidentiary facts.

THE COURT: SDDS says the opposite. There better be underlying facts to support ultimate fact.

MR. WELK: But the ultimate fact does not have to go through witness by witness as to what they said. We may have a difference as to what an ultimate fact is, but to me it's not necessarily saying witness A said this; witness B said that. Yes, there needs to be, you know, a basis in fact, but it doesn't need to go exhibit by

1 exhibit and witness by witness.

2 THE COURT: But it can if it wants to.

3 MR. WELK: I suppose, but I don't think that's what
4 ultimate findings of fact are all about. Then you would
5 have to make a finding about every witness and every
6 exhibit. That's the logical extension of how these things
7 are drafted and I don't think that's what the Supreme
8 Court has said in its legion of cases about talking about
9 how to draft findings of fact and conclusions of law.

10 But we've also -- there's some -- we believe that
11 Findings of Fact XXIII through XXX, which is the substance
12 about the rate, and Conclusions of Law V to IX need to be
13 reversed because those, we believe, are errors of law and
14 believe that the application of the Findings of Fact
15 justify the reversal of the decision.

16 I do want to talk about the public interest findings
17 of fact because I don't think that clearly -- I mean --
18 our position is, and the Commission has disputed this, is
19 that in setting these rates, the element of public
20 interest is not one of those elements that the Commission
21 is authorized by law to consider.

22 Now, the Commission in its brief said -- and it cited
23 the Interstate case as being the case that said public
24 interest. If you go read again the Interstate case, it
25 dealt with 49-31-20 and 21 that had specific statutory

requirements of public interest. There is nothing in the setting in the statute that allows the Commission to set up access rates in the rules that talks about public interest. The Supreme Court has reversed time and time again the Commission when it's exceeded its statutory authority.

And I ask where is public interest to be determined as a fact by this Commission in setting switched access rates? It said fair and reasonable rates and the Commission, you can go ahead and set 1-26. They've had 1-26 regulations. They put 1-26 in and as applied to this case and this rate. Where is the public interest determination to be made? And they just, you know, unilaterally said it's in the public interest. You correctly pointed out there's no underlying fact to state that plus there is no legal authority for that finding.

What I want to conclude briefly with, your Honor, is the takings claim. We claim that the Commission's decision ought to be reversed because the decision in this case results in taking of US West's property. And the argument is relatively simple.

That is that US West is required to furnish its property to the public and to these other carriers, to provide long distance service through switched access rates. If these rates are unreasonably low and US West is

forced to use its property to provide facilities to these companies, that rate -- if it's too low it becomes confiscatory and that violates applicable constitutional provisions. And we claim, without a dispute, that we're providing residential rates below cost. The Commission has already made that finding in another docket. At the same time, we are providing local service below its cost as determined by the Commission, and we are now forced to provide switched access rates at below what we are entitled to under their rules. And we claim that's a takings. And so we believe that the Commission's decision ought to also be reversed on the takings issue alone.

The --

THE COURT: Did you argue takings to the Commission?

MR. WELK: No. It's a constitutional issue. And as we've talked about, we're not required to argue constitutional issues to the Commission. They can't adjudicate it. This is the court where we make the constitutional argument and we have made it.

I've already talked about the relief, your Honor. We've had the colloquy on that. Our request is that you either impose 6.14. And they say that just -- the substantial evidence doesn't exist. And my last comment is where is the Commission's substantial evidence to support its decision? What do they point to as

substantial evidence to support their decision? We believe there's none and on the record you can impose the 6.14 by virtue of judicial review. You have an obligation to look at the record and you can determine if you believe that it's been clearly erroneous and an abuse of decision and find 6.41 rate is there.

If you don't want to make that factual decision, I told you today we're willing to accept the 5.5, accept the valid criticism. There's no need to have remand so that my client can go ahead and start charging.

If you need to remand, I suggest respectfully that the remand say that it be remanded to the Commission, that the rate be set between 6.14 and 5.5, that the remand be limited to only correcting its decision and on the record that's already there and that they be forced to enter the decision within a certain period of time, which I would believe would be between 10 and 20 days would be necessary to correct these findings.

With that, your Honor, I will hold the rest of my remarks until other counsel have had an opportunity.

THE COURT: Mr. Hoseck.

MR. HOSECK: Thank you, your Honor.

I submit to the Court that there is really an evidentiary question in this case and under the standards of SDCL 1-26-36, we're talking about the clearly erroneous

rule or the arbitrary and capricious standards.

I think that Mr. Welk's argument today emphasizes the point that I made in my conclusion in my brief and that is that a rate case should not be the equivalent of an auction. Because the record reflects that in this matter the 5.55 cents rate, Mr. Culp was asked if that was in fact US West's testimony or if they were adopting that position in any manner and he said no. I think that it is unusual to ask this Court to decide a matter that properly belongs before an administrative agency.

THE COURT: Well, I can shorten this. I probably am not going to set a rate. I just don't think I can do that. That's the Commission's job. That's their authority and I don't think I can -- I have authority to do that.

MR. HOSECK: Okay.

And secondly, there are a couple of statutes that apply here under the utility aspect of this. And one is 49-31-18, which talks about -- that's the general statute that allows the Commission to adopt the rules for the cost study. And I would emphasize to the Court that that statute talks about the Commission being able to determine methods designed to determine and implement fair and reasonable access rates.

Secondly, under 49-31-12.4, in any type of a rate

case, the burden of proof is upon the company to prove its case that its rate is fair and reasonable. If I were to make two points in my argument, your Honor, the first would be that the rules are not an automatic thing as US West proposes. And secondly, the record that is before the Court indicates that the information before the Public Utilities Commission was unreliable for several reasons and that is the basis for their decision.

THE COURT: You're relying on the five -- the five things stated in the motion in that transcript?

MR. HOSECK: Yes.

THE COURT: Okay.

MR. HOSECK: Yes.

Back to the first point on these rules not being automatic. They specify, and in the rules cited by US West, which is 20:10:27:02, talks about charges that are to be computed, assessed and collected under these rules. It does not talk about these inputs. The inputs are the critical thing.

And what was before the Commission in terms of evidence, we had three different rates at one time that had been -- that were discussed in front of them that this alleged automatic cost model system had produced. And secondly, when it got down to the hearing we had in front of the Commission, US West essentially is cutting a deal

1 with staff and saying, we'll take their 6.1 cent rate.
2 And now this 5.55 cents is determined, as I believe the
3 word was "insignificant" in their brief.

4 This indicates, I would submit, a reasonable mind and
5 the minds of the Commission, and I would hope the Court,
6 that there is a problem here as to the evidence that was
7 put on in front of them. And what did the Commission have
8 to look at? They had the prime witness of US West, Mr.
9 Culp, who swore to the truthfulness of the numbers, yet
10 had no hands on responsibility with them. He was the
11 supervisor.

12 THE COURT: You know, but experts do that in court
13 every day.

14 MR. HOSECK: Absolutely. But it still is within the
15 province of the Commission as to whether or not they want
16 to give that type of testimony any weight or credibility.

17 THE COURT: But the problem here is I don't see a
18 finding saying that the -- for instance, that the
19 depreciation numbers were wrong and should be thrown out
20 because A, B, C, D. What I see here is they're just
21 saying we have concerns, we're not sure about these
22 numbers. We don't feel comfortable with them. But there
23 are no findings saying we should reject the depreciation
24 issue because so and so established that it's not reliable
25 in this context. There's nothing like that.

MR. HOSECK: That's true. That goes to the essence of what the Commission did in this case. That is, they basically said we're not satisfied with this record, we're going to reopen it. And they were told no, you got everything that you're going to get from us.

THE COURT: You know, the Commission has broad powers under that -- what is it, 7.1. I mean, they can get about anything they want. Why -- if they wanted to scrub the numbers and were uncomfortable with them and US West said, look, we think we presented our case, why didn't the Commission or the staff say, all right, here's a subpoena or provide us with this, provide us with that to satisfy their concerns?

MR. HOSECK: I think that the Commission looked at this in the terms of the burden of proof and featured it the company's burden to come forward and to prove its case. And essentially as a preliminary matter, the company was told that it had not proven its case and was given a second bite at the apple, so to speak.

Secondly, the staff had not done anything but rely upon secondary sources. They had confirmed no law data. There had been no random samples, no verification and this was obviously a concern to the Commission.

THE COURT: But the Commission didn't reject staff's testimony.

MR. HOSECK: They did not.

THE COURT: They expressed concerns and they did not do what they did to Culp. They tried to -- well, they did reject Culp, but they didn't reject their own staff witnesses.

MR. HOSECK: I think the primary reason for that is again, it goes back to the burden of proof that the company has. The staff really didn't have a burden of proof or at least if they had one it was not the same as that of the company, which is statutorily defined. I think that's the distinction.

THE COURT: But the way I see this case is US West is saying, hey, we're willing to rely on staff numbers, staff inputs, staff numbers. They're in the record. There's no evidence that I see in this record discrediting the staff conclusions.

MR. HOSECK: That's absolutely true. They -- but the corollary to that, your Honor, is that here we sit today and they're now saying they're willing to accept AT&T's numbers. That is not the way a rate case should be handled. It should be handled like any other type of quasi-judicial administrative proceeding where people come in, meet their burden of proof, put on evidence that is, at least in the eyes of the trier of fact, credible and should be given some weight. And that's -- that's the

bottom line on it, your Honor.

THE COURT: Well, then -- then let me ask you this. You know, the question is is there substantial evidence -- under your theory of the standard of review, the question is is there any substantial evidence in the record to support the Commission's decision? The Commission's decision here is no increase. Zero increase.

MR. HOSECK: Yes.

THE COURT: What evidence -- not suspicion, not speculation, not conjecture, what evidence -- substantial evidence in the record is there to say that the rate should be 3 point -- what is it, 3 point something, 3.1 or something like that, what they're charging now. In other words, what evidence in the record is there to support a no increase, because that's what essentially happened here.

MR. HOSECK: The evidence -- the substantial evidence in the record, your Honor, is really expressed in terms of a negative and that is that there is nothing -- as based upon Mr. Culp's activities and the cost study and staff's activities, and so on and so forth, all those activities added together do not support the conclusion that the rate could be granted. And so in denying this, the Commission has said there was not substantial evidence in the record for us to make a decision. That's what there is. It's --

1 I don't know how else to express it other than it is in
2 terms of a negative.

3 THE COURT: You mean an absence of evidence?

4 MR. HOSECK: Yes.

5 THE COURT: Well, if there's no evidence, then this
6 decision can't be sustained.

7 MR. HOSECK: Well, but the -- if there's an absence
8 of evidence, your Honor, then there's nothing to sustain
9 the rate increase. That's the problem.

10 The rate increase -- the burden of proof is upon US
11 West to come in and prove their case. It's not upon
12 anybody else to prove it for them. And if they did not
13 come in and prove their case, then the Commission really
14 had nothing to work with. It goes back to the basic
15 theorem of my brief and that is that the record was
16 inadequate. It's a question of fact. And there was
17 nothing in there to sustain the granting of this fact of
18 this rate increase and that was fair and reasonable under
19 the statutory standard.

20 THE COURT: But there is evidence in the record to
21 sustain some kind of rate increase. I'm going to read
22 right from your brief. You say, "Depending on what cost
23 study or whose analysis the PUC would believe, the
24 switched access rate ranged from 6.4 to 5.55."

25 Now, that to me says that you've conceded there's

1 evidence in the record, depending on who you're going to
2 believe, that there's a range of numbers from which the
3 Commission should make a decision.

4 MR. HOSECK: I'm not sure that the Commission found
5 that because ultimately that thing, as I recall you're
6 reading it, said depending upon what was said and whose
7 cost study.

8 THE COURT: "Depending on what cost study and whose
9 analysis the PUC would believe --

10 MR. HOSECK: Yes.

11 THE COURT: -- the switched access rate ranged from
12 6.4 to 5.55."

13 MR. HOSECK: I think the key thing there, your Honor,
14 is who they believe, who they give any type of weight and
15 credibility. They basically made an initial decision that
16 they were not satisfied with anything that was in front of
17 them and attempted to reopen the record.

18 THE COURT: They didn't reject staff.

19 MR. HOSECK: They didn't reject -- that's right.
20 That's right.

21 THE COURT: So the staff numbers are there.

22 MR. HOSECK: Staff numbers are there.

23 THE COURT: How can they be rejected? You know, the
24 statute says that this Commission's duty is when this
25 occurs, when someone files a tariff stating a new rate,

1 that, you know, you have the hearing, et cetera, you have
2 the potential for unilateral implementation and it's --
3 you shall have a hearing. And then it says after the
4 hearing the Commission's obligation or duty under the
5 statute is to "determine a fair and reasonable rate or
6 price, render a written decision specifically setting out
7 the rate or price and prepare a record of its proceedings
8 and findings."

9 Now, I mean in your brief you say that there was
10 evidence of a range and rather than doing this statutory
11 duty, it looks to me like they just dumped the case.

12 MR. HOSECK: Well, I disagree in this sense. And
13 that is if you look at what staff did in terms of staff's
14 rate in this matter, I think that the Findings of Fact
15 showed that nobody had done any independent verification
16 of numbers. That was of concern to the Commission.

17 THE COURT: But they've never done that before. They
18 -- I read their testimony. And they were obviously
19 satisfied -- they had this dialogue with US West. They
20 said, well, we don't agree with you. I think there were
21 nine points in dispute, if I remember the record right.
22 And they said, US West, give us this information, give us
23 this, based on the information they requested, they were
24 comfortable with their numbers.

25 And they didn't -- they -- as I read the record, they

1 were specifically asked, did you read Parker's -- did you
2 hear or read about Parker's criticism, and did you hear
3 these other criticisms. And inspite of that, I don't see
4 any evidence that any staff said, well, yeah that's a
5 point well taken. No, they stuck to their pre-filed
6 testimony.

7 MR. HOSECK: But ultimately, your Honor, at Finding
8 of Fact XXV, the Commission found that inputs into US
9 West's cost study had not been adequately verified. That
10 was the Finding of Fact that I would submit to the Court
11 is very critical in this as far as forming a basis of the
12 Commission's decision.

13 THE COURT: Well, which inputs and why aren't they
14 adequately verified? I mean, don't we have an SDDS
15 problem here?

16 MR. HOSECK: Well, no, your Honor, because I think if
17 you go back to Findings of Fact VII, VIII, and IX, there
18 is a specific -- there are specific findings as to the
19 actions of staff in this matter. And it was that there
20 had been nothing that had been done to confirm the inputs.

21 There was -- the bottom line on this thing, your
22 Honor, is that there was obviously a question, the
23 evidentiary shadow, whatever you want to call it, in this
24 case that when three cost studies were brought before this
25 Commission, three different rates went in, an acceptance

1 of staff's position, a cutting of a deal in essence in the
2 presence of the Commission for the 6.1 cents, there was a
3 question raised in the minds of the Commission as to the
4 adequacy of the job done in looking at the inputs to this
5 cost model. That was the critical thing that they were
6 not comfortable with. And they asked that it be done
7 again and that somebody look at this and it wasn't done.

8 THE COURT: That's obvious. The problem I see is
9 they did not reject the staff numbers. At least the
10 Findings don't say that. They expressed concern. They
11 say well, you know, he didn't do this, he didn't do that,
12 but they said -- they didn't do what they did to Culp and
13 say therefore, we reject staff.

14 MR. HOSECK: As to a specific finding specifically
15 saying we reject staff, that is correct, your Honor.

16 However, when you read the entirety of this -- of the
17 Findings of Fact in this matter, there is a tie in between
18 what staff did or didn't do and the ultimate conclusion
19 that there was not an adequate verification and that there
20 was not a meeting of the burden of proof by the company.
21 And that's what it all relates to.

22 I would submit, your Honor, that the Commission
23 properly found that no weight should be given to the cost
24 study, and that Mr. Culp's evidence and his testimony was
25 not credible.

1 As to this matter of the public interest
2 determination, I would submit to the Court that this is
3 always a consideration that the Commission could properly
4 look at. And for most in this matter, I think that the
5 deficiency in the record that was before the Commission
6 was a legitimate grounds. If nothing else, this was a
7 legitimate ground for the exercise of the public interest
8 doctrine by the Commission because the question is if any
9 of these rates would have been implemented, what was there
10 to back it up? And I think that there -- the record amply
11 demonstrates that there is a deficiency in that record.

12 Again, I would submit, US West did not meet its
13 burden of proof in this matter. There were numerous
14 conclusions as to what rate is the proper rate in this
15 case. There were questions that were raised which were
16 not answered for the Commission and the Commission took
17 the proper action in this case by denying the request.

18 Briefly on the takings issue. I think this fails on
19 a ripeness issue. And it gets down to a more fundamental
20 thing and that is that US West does not have any type of
21 inherent, inalienable right to a rate increase. It is a
22 matter that is subject to proof. And the question here
23 under the clearly erroneous standard is has a mistake been
24 made. I don't think that one has.

25 And in conclusion, your Honor, I would ask that the

1 decision be affirmed. I don't think remand would serve
2 anything in -- any purpose in this case. In essence, US
3 West was offered that opportunity at one point in time and
4 it was -- it was denied. They did not -- did not take
5 advantage of that opportunity. And I would respectfully
6 ask that the Court affirm the Commission's decision.

7 THE COURT: Thank you. Okay. Who wants to go next?
8 Mr. Lovald.

9 MR. LOVALD: If it please the Court.

10 I'm not going to retread ground that Mr. Hoseck has
11 already covered. In fact, I'm going to try to focus on a
12 couple of, what I perceive to be, extremely critical
13 points that Mr. Welk has ignored that I think point out
14 the fact that the Commission's decision in this case was
15 proper, and was the only decision that could have been
16 made and should be sustained.

17 US West chastises the Commission for having taken
18 public interest matters in consideration in this case. US
19 West would like the Court to believe that the switched
20 access rate increase it sought was sort of like picking
21 fruit off a tree, that if you stuck these inputs into the
22 computer and it spits out 6.5 and that they had to be
23 given 6.5. And that just isn't necessarily true, your
24 Honor.

25 If you'll review the switched access rules that US

1 West now wants to apply and wants to immediately use to
2 justify their increased rate, there's -- there's a section
3 of those rules, which I think the Commission cited in
4 their brief as ARSD 20:10:27:20. It's a phase in rule.
5 It says that if the Commission determines that there's
6 going to be a substantial increase in an access rate, that
7 they have the discretion to phase that rate in over a
8 period of time. That was argued at the Commission level.
9 Evidence was presented.

10 The Commissioners in some of the statements in the
11 record said this case presents rate shock of the worst
12 type. And basically, the Commission never got to that
13 point. The Commission -- I think part of the argument
14 was, you know, the decision is between 6.14 and 5.5. I
15 submit, your Honor, the decision is between 6.14 and 3.14.
16 I think an excellent argument can be made and was made to
17 the Commission that let's phase this thing in and the
18 first step of the phase in was probably 3.14 to get you to
19 your decision.

20 There's another docket that's open in the PUC right
21 now, 96 -- I think it's 032. The Commission solicited
22 input from all of the telecommunications carriers over
23 whether they should make any revisions in their switched
24 access rules. Inputs were provided. No decision has been
25 made in the docket. And I think there's a pretty logical

1 argument if phase in is used by the Commission that step
2 one is 3.14 until you get to the determination as to
3 whether there's going to be any change in the rules.

4 But I wanted to make that point, your Honor, because
5 the Commission -- and you can tell from the comments that
6 were made in the Findings, you can tell by Commissioner
7 Burg's reference in the record to the yo-yo effect, that
8 they were concerned with the situation if we take the rate
9 now and the rate drops back down, you know, that doesn't
10 do anything for consumers. It doesn't do anything for the
11 small companies.

12 And I just want to clarify the record on the point
13 that public interest is involved, was involved and I
14 think, you know, they took an appropriate look at it.

15 I'd also --

16 THE COURT: But isn't it the Commission's decision to
17 do that phase in?

18 MR. LOVALD: Yes.

19 THE COURT: I mean, a utility can say, I want it all.
20 But it's the Commission's responsibility.

21 MR. LOVALD: It's the Commission's decision and the
22 Commission never got there, your Honor, because the
23 Commission said we're not satisfied with the inputs.

24 And I think it's part of the record, but when we
25 filed our reply brief at the Commission level, we filed a

1 lengthy decision of the Washington Utilities Board in
2 response to a US West rate increase in the State of
3 Washington where they were requesting rate increases. The
4 Commission out there after an audit determined that a 91.5
5 million decrease was appropriate and that included about
6 \$29 million worth of switched access decreases. So the
7 Commission had that information in front of them too.

8 And Mr. Welk says this is unprecedented and the
9 Commission has never subjected any other utility to this
10 sort of scrutiny, but again I think you've got to look at
11 the history of this, your Honor. These rules were adopted
12 in 1992 by the Commission. US West up until 1996
13 consistently took the position, we don't want them, we
14 don't need them, we're not going to price according to
15 them. Mr. Welk criticized us for not talking about the
16 Telecommunications Act, but I submit, your Honor, that
17 their attitude changed when Congress passed the
18 Telecommunications Act. And they basically took the
19 immediate flip-flop of the position we now want, the --
20 you know, the revenue stream that that would provide and
21 we want it now and we want it all.

22 THE COURT: How is that relevant to whether there's
23 substantial evidence to support zero increase in this
24 case?

25 MR. LOVALD: You know, it's relevant, your Honor,

1 because if they were to have received that entire
2 requested increase, it would have had a tremendous impact.
3 I think the testimony from Mr. Riter's client is in the
4 record in that respect -- and that record was the record
5 that was before the Commission -- they were prepared to --
6 you know, they were prepared to go to the next step and
7 take additional --

8 THE COURT: Except that you filed the motion to
9 dismiss.

10 MR. LOVALD: Correct. And, your Honor, I guess --
11 you know, I guess the point is that where you have the
12 phase in statute that was there, and where the Commission
13 knew that the phase in statute was there and wasn't
14 satisfied with the record and where US West says even
15 though you're going to give us another hearing and another
16 opportunity, we're going to unilaterally implement the
17 rate, I would submit, and on the basis of record before
18 the Commission, that they did the only right thing.

19 THE COURT: Well, except the statute says it gives US
20 West, it looks to me, like the right to unilaterally
21 impose any rate that's -- whether it's fair and reasonable
22 or not. But they've got to -- after the Commission has
23 the hearings, does the investigation, makes the findings,
24 they've got to pay it back. Isn't that what the statute
25 contemplates?

MR. LOVALD: Yes, your Honor. I think it does. And I think -- but at the same time where the burden of proof, I think the Commission Findings are clear. They didn't feel that US West had met its burden of proof on all of the factual issues. If you're faced with number one, do we give them another shot and let them unilaterally implement or do we dismiss the case on the basis of insufficient record and let them come back in tomorrow and start anew? I think they made the proper decision.

THE COURT: Well, going back to your public interest and the phase in and the impact on the other companies. As I read this motion that was adopted to reopen the record, there's five factors they were concerned about and three of them involved what you're talking about, public interest, impact on the other carriers and all that. It seems to me that the impact on the area carriers is evidence that you guys had the responsibility for. And it seems to me that those three -- at least those three issues, there were five of them that I count, but of those three, that was your obligation to present evidence on that. How could US West be faulted for not providing evidence on how this was going to impact you and therefore, the phase in should be as follows, et cetera, et cetera, et cetera.

MR. LOVALD: Your Honor, I read the Commission's

1 findings and decision, you know, when they made the
2 decision to reopen, there was ample evidence in the record
3 presented by Mr. Riter's clients, the TAG group, that
4 there would be a substantial impact. I read the
5 Commission's -- I basically read the Commission's decision
6 to reopen as basically in telling these companies, you've
7 told us in conclusionary terms that it's going to affect
8 you substantially, but if we're going to go back anyway,
9 let's have some more detail. I would agree with you that
10 I think --

11 THE COURT: But the detail -- that detail did not
12 come from US West.

13 MR. LOVALD: No, that's true.

14 THE COURT: That detail -- so why should they dismiss
15 the case on those factors, rate shock? The actual motion
16 is the specific effect of any raise in access charges on
17 the small resellers, such as those represented by the TAG
18 group. How can you -- why should the motion to dismiss be
19 granted for failing -- for failure to present evidence on
20 this when obviously US West couldn't do that? That was
21 your guys' responsibility.

22 MR. LOVALD: You know, I agree that the burden on
23 rate shock was probably, you know, probably on our side of
24 the table, your Honor. But again, I would urge the Court
25 that the Commission's decision to dismiss on the initial

1 input item, you know, was more than justified. And I
2 think the Commission has inherent authority any time a
3 company makes a request to request additional information
4 and request the additional scrubbing as to any number or
5 any aspect of the case that it desires information on.

6 I want to get back -- before I sit down, your Honor,
7 I want to talk about the represeted depreciation issue
8 because I think this is a glaring deficiency in terms of
9 what happened in that particular case. The Commission
10 approved the stipulation that I think is in the record as
11 an exhibit, in TC 94-121 giving US West some pricing
12 flexibility and the stipulation purported to deal with
13 local rates, business rates, but also dealt with -- dealt
14 with switched access.

15 One of the Commission findings in that particular
16 docket was that the commencement by US West to utilize the
17 represeted depreciation bond have any effect on US
18 West's customers. It's about a three-year stipulation, I
19 assume, you know going forward from the time it was
20 approved in early January.

21 But one of the first things that happened in mid-1976
22 is US West used the represeted lives, which are
23 shortened lives, which means you shorten the life, you're
24 going to kick your cost up. And in its switched access
25 runs and one of the criticisms by the parties to the

1 proceeding before the PUC is that that very action in
2 using represcribed depreciation violated and was directly
3 contrary to the Commission's finding in the previous
4 docket. But it also highlights part of the problem with
5 witness Culp because when he was being questioned on some
6 of the depreciation issues he just basically said, well,
7 I'm not a depreciation expert. You know, you couldn't get
8 the information.

9 And I invite the Court to read his testimony closely
10 because there was an arrogance there and I think there was
11 an evasiveness when he was being asked questions by
12 attorneys in terms of providing as little information as
13 he possibly could to the inquiry process. And I think the
14 Commission got frustrated with that.

15 But I -- like I said, I'm not going to cover points
16 that Mr. Hoseck has already made, but in conclusion, I
17 would respectfully submit that on the basis of the entire
18 record, you should affirm the Commission's decision.

19 THE COURT: Just so I understand though, on the
20 depreciation issue, even if your point was adopted, as I
21 understand the record, that still would get you no lower
22 than 5.5.

23 MR. LOVALD: That would get us no lower than 5.5,
24 your Honor, but it also, your Honor, would get us to the
25 point where the Commission still has got to look at it, I

1 think, as a phase in situation. Even if you said that's
2 all that the record determined, there's still an
3 unanswered issue hanging out there that I think would
4 totally prohibit any finding at this level of a particular
5 rate or mandate that they adopt a particular rate.

6 THE COURT: Well, okay. Well, on the phase in issue,
7 what else was US West obligated to do at that second
8 hearing to establish an appropriate phase in? What
9 evidence could they have offered in addition to what
10 they've already offered?

11 MR. LOVALD: I don't know, your Honor.

12 THE COURT: Well, there isn't any, is there?

13 MR. LOVALD: Again, I don't necessarily disagree with
14 you at that second hearing that the TAG members would have
15 had to present some additional testimony to the
16 Commission. But at the same time, I think if you look at
17 the existing record, there's quite a bit of testimony
18 already on rate shock.

19 THE COURT: But then it was the Commission's
20 obligation to make that decision of how to do the phase in
21 based on the evidence from the other members of the public
22 -- or the other carriers, right? Shouldn't it have been
23 their obligation at that point?

24 The statute says after hearing they are to determine
25 a fair and reasonable rate, render a written decision

1 specifically setting out the rate, and prepare a record of
2 the proceedings.

3 MR. LOVALD: I guess I disagree with you on that
4 point, your Honor, because I still feel they have inherent
5 discretion if they feel that the basic inputs haven't been
6 justified that they --

7 THE COURT: You just switched. I'm trying to keep
8 you pinned down here to the public interest and impact on
9 the other parties.

10 MR. LOVALD: Yeah, I will agree with you to this
11 extent. You know, if you have to -- if you accept the
12 fact that there's a certain number on the table that is
13 irrefutable and indisputable according to the record, then
14 I would -- then I would agree with you, your Honor, that
15 then the Commission would have had to move on and say
16 okay, what do we do, if anything, with phase in? But I
17 guess I disagree with the assumption that we ever got to
18 the point where that number was clearly established to the
19 point that the Commission had to accept it.

20 THE COURT: The Commission concedes in its brief
21 though there was a range.

22 MR. LOVALD: I don't read -- I don't read that
23 sentence in the brief as a concession, your Honor.

24 Thank you.

25 THE COURT: All right. Mr. Harmon.

1 MR. HARMON: Thank you, your Honor.

2 Tom Harmon for Sprint Communications. And I will do
3 my best to address points that have been brought up here
4 and in Appellant's reply brief regarding what occurred
5 here below.

6 The standard of review issue that this is a mixed
7 question of law and fact, I believe, this is adequately
8 addressed that that is the Commission's obligation to make
9 this -- what is essentially an ultimate fact finding as to
10 what is a fair and reasonable determination. Nowhere do I
11 see that there is any switch of burden to anyone else.

12 The -- there have been some discussions here this
13 morning about whether this range is between 5.55 and 6.4.
14 The presumption that supports what the Commission did is
15 that the status quo is correct and requires no further
16 proof of the matter. US West had an obligation to bring
17 it forward and it attempted to do so. It attempted to do
18 so through Mr. Culp and through the cost study.

19 The Commission rejected Mr. Culp and it rejected the
20 cost study analysis through the rules. The Court has
21 pointed out that it did not specifically reject the
22 credibility or findings of staff. However, it did reject
23 the underpinning assumption that in both US West and staff
24 and that they were the inputs into the cost study. The
25 Commission did not feel --

1 THE COURT: Which inputs?

2 MR. HARMON: They've been established.

3 THE COURT: I didn't see any inputs -- any particular
4 inputs being rejected and other -- any reasons for
5 stating -- for rejecting a particular input.

6 MR. HARMON: They essentially indicated that they
7 were not convinced.

8 THE COURT: They are uncomfortable as best I can see.

9 MR. HARMON: By the figures that were there.

10 And one of the points that I think is raised here is
11 that there's a lot of talk about the ARMIS study. As far
12 as I can tell in reading through the transcript -- I was
13 not present at the hearing -- I don't think it was ever
14 moved into the record.

15 THE COURT: But the experts all relied upon it. I
16 mean, that's pretty standard practice too. I've never
17 read one of those reports, but it looks to me like
18 everybody relies on them.

19 MR. HARMON: That does appear to be the case. It
20 does not appear to be the record in this case.

21 The -- US West argues in its reply brief about
22 meeting the burden of proof. Sprint raised an argument
23 about that there had been no evidence submitted whatsoever
24 regarding the fairness issue. And the statute clearly
25 requires that this be fair and there be some proof brought

forward to do it.

US West's response to this is that if you run it through the computer model, that's how you conclude whether it is fair. I would submit that that's not what the rules say. Even the rules set out by US West in its reply brief, ARSD 20:10 -- 20:10:27:02 says that -- 10:27 and 10:29 establish rules for determining switched access rate charges for switched access services shall be computed, assessed and collected as provided in these chapters. Nowhere does it say that they will be approved through that process. The approval requires the Commission to make a determination that there has been a fair application. The Commission concluded that there was no proof.

When you look at this question that the Commission asked, it was clearly addressing itself to the fairness issue -- the rate impact. The resellers will talk as to how that applied to them, but that evidence was submitted. US West has exactly the same kind of discovery mechanisms available to it to determine whether the 109 and 115, 120 percent rate increases, whether that has a negative effect upon the resellers and the public as it was testified. They have those tools available to them. They chose not to do so.

THE COURT: Well, but wait a minute. I'm reading

from the record here and this -- and Commissioner Schoenfelder made the motion which was adopted and she says, "These companies --" and she's referring to the resellers "-- have not come forward with specific numbers which would allow me to assess the effect in quantifiable terms."

In other words, the resellers have not presented alternatives to the results of the cost model. Now, should the case be dismissed against US West because the resellers failed in their obligation? That's what I hear you arguing.

MR. HARMON: It appears that there is evidence in the record of the effects upon the resellers. There was no representation of that record so far as I can see.

THE COURT: Well, you're saying that US West had the burden on this issue?

MR. HARMON: I don't see that US West's burden ever switches in this matter of proving that the rate increase that it is proposing is fair and reasonable. That's what the Commission identified in its findings as the public interest determination is about.

THE COURT: So you think US West has the burden in -- I'm reading from her motion -- to come forward with the specific numbers which would allow the Commission to assess the effect on the resellers in quantifiable terms?

MR. HARMON: Once something had been presented and something had and it is in this record and it's not been rejected that there was this rate shock impact possible, and that it would have negative effect on them, US West had the burden. I submit the burden never did change. But it had the burden to establish that there was something wrong or that that was not the case.

The constitutional issue as to the taking has been addressed here. The cases cited by US West in its reply brief have to do with a Commission -- with an agency making a determination of whether the statute under which -- which it acts is constitutional. We would have no disagreement with that that agencies cannot make a determination as to whether a statute is constitutional.

Whether they can apply the constitutional standard of whether something is a taking is quite another matter because it does not go to their actual ability to act. This issue was not presented to the Commission in any form and if it is to -- if it is to make up part of the bundle of standards by which a rate increase is to be judged, then it would seem absolutely essential that it be presented to the body that by statute has the authority to make the rate increase.

There was some discussion about the records that were submitted, the cost study, and that it falls under the

business records exception in the reply brief. There's no mention of a 1992 opinion by our Supreme Court of State v. Brown where it sets out what is required foundationally in order to apply to the public records exception. And that did not appear to be the testimony from Mr. Culp regarding records upon which they relied.

Sprint would urge the Court to affirm the Commission's actions.

THE COURT: Thank you. Mr -- who's next?

Mr. Sahr.

MR. SAHR: Good morning, your Honor.

The first issue that I would like to address is the standard of review that should be applied in this case. And again, I will look to Permann which discusses whether the review is one of fact or one of law. And Permann says that if the application is of the -- if it's an application of a rule to law and it's essentially factual, then the review should be under the clearly erroneous standard.

And for instance, in this application that depends upon the fact finding tribunal's experience would be one that they -- that relies on looking at the facts that are presented to the tribunal. And I think there's a case that's on point in this matter and it's the Matter of Northern States Power, 489 NW2d 365. And it discussed

1 the question of whether facts or law were involved.

2 And as it's been presented to the Court it talks
3 about how the questions of fact are given greater
4 deference. And specifically addressing the Public
5 Utilities Commission, the Court in that case said that it
6 would not substitute a judgment for the PUC on the weight
7 of evidence pertaining to questions of fact unless the
8 PUC's decision is clearly erroneous.

9 And later in that same decision, the Court goes on to
10 say that this Court has previously stated that the PUC is
11 deemed to be an administrative tribunal with expertise.
12 Thus, we think it is inappropriate in a situation such as
13 this for the Court to defer to the PUC's expertise in
14 matters which lie within its particular field of
15 knowledge. And I would submit to the Court that this is a
16 -- we are discussing matters that lie within the Public
17 Utilities Commission's expertise and that are based on
18 factual issues. And the case is fact laden.

19 Looking at SDCL 49-31-12.4, 3, the telecommunications
20 company that is filing for a tariff bears the burden of
21 proof to show that the tariff is fair and reasonable.
22 SDCL 49-31-1.4 lists the factors that should be considered
23 in determining whether a price is fair and reasonable.
24 And those include the price of alternative services, the
25 overall market for service, the affordability of price for

1 the service and market in which it is offered, the impact
2 of the price of the service on the commitment to present
3 affordable uniform service and fully allocated cost of
4 providing the service. And these are all factors which
5 are again fact laden. So I would submit to the Court that
6 the clearly erroneous standard should apply.

7 When looking at the facts, the Commission was
8 uncomfortable with the results of the computer model. And
9 I think that in that conclusion that there are underlying
10 reasons, whether stated or not, that they were
11 uncomfortable. And I think it comes down to that they
12 were uncomfortable with some of the data and the ability
13 to verify that data. And perhaps it was not stated in the
14 Findings of Fact, but I think it comes down to that if the
15 inputs are questionable then the results are questionable.
16 And perhaps they concentrated too much on the results, but
17 I think that they were in fact looking at the inputs as
18 seen in the results.

19 Under the clearly erroneous standards, MCI believes
20 that the decision of the PUC should be affirmed and that
21 the burden is on US West to show that the tariff is fair
22 and reasonable, that the PUC was in the best position to
23 judge the witnesses and their credibility and what sort of
24 weight they should give to the evidence that was presented
25 to it? And they gave very little weight to the US West's

positions. And US West was in fact given a second chance to offer more -- offer more testimony and they refused.

And for all these reasons, MCI believes that the decision of the Public Utilities Commission should be affirmed.

THE COURT: Okay. Mr. Riter.

MR. RITER: Thank you, your Honor.

If it please the Court and counsel. I realize there's been a lot of arguments already to the Court and I think, however, that some of the thoughts I'd like to share with the Court are important to the decision in this matter.

We represent the Telecommunications Action Group, which is a group of five resellers. Four of the five only do business in South Dakota. One of them does extend across state lines, but four of the five only do business in South Dakota.

And as the evidence revealed and as the PUC found, the rate increase proposed by this switched access rate was very significant to all of these people. And as some of the testimony revealed, they said that 50 percent or 60 percent of their direct costs were these switched access rates. And they also testified that perhaps 100 -- some of them said even more than that, even 125 percent increases in switched access rates would mean significant

1 increase on them and their direct costs. Some of them
2 also testified that they had contracts where their
3 subscribers and under the contracts with their
4 subscribers, they could only increase it 10 percent a
5 year.

6 So you're going to have -- if the Court were to -- if
7 the PUC would, rather, have adopted an increase such as
8 suggested by US West, it would have had a severe impact on
9 competition, not just merely upon resellers or small
10 business people doing business in South Dakota that we
11 represent, but the people out there, consumers out there
12 that are now able to receive some good rates because of
13 the competition in the market place.

14 And there's been -- there's been argument relative to
15 the federal act and, you know, what's the impact and how
16 come we didn't talk about it. But the underlying basis
17 for the federal act was to foster competition. And if
18 we're going to foster competition, we're not going to
19 increase the rate by 125 percent to these resellers and
20 then increase their direct costs correspondingly so they
21 can do business. They can't compete with US West. And I
22 suspect if I was US West, I'd love nothing more than to
23 eliminate some of my competition. And we think that the
24 rates that would be a result of the increase requested by
25 US West would eliminate competition or have a severe

opportunity -- significant opportunity to eliminate.

Now, the Findings of Fact set out the specifics of the testimony and if you might, you've got five reseller companies in South Dakota. All of their small companies are small South Dakota companies. They're competing out in the field with the big companies, all of whom you've heard from this morning, and it's not an easy task to be faced with, frankly.

Also, they're faced with the difficulty and the Court pointed out, well, couldn't they have produced more evidence about something in particular, but you're faced with the situation where we've got Jerry Noonan, who is a certified public accountant; we've got Fred Thurman, who is a certified public accountant. Those individuals, we believe, are qualified to express expert opinions and not only as certified public accountants, but as presidents of their various companies relative to the effect that this would have on them.

Now, we didn't have a cost model. There was some comment made in one of findings about the small resellers did not present alternatives to the cost model results. But yet the issue -- and I think it was Mr. Harmon perhaps that pointed it out -- the issue is whether or not US West sustained its burden of showing that these rates were fair and reasonable that they proposed to the Commission. And

we suggest they did not. And I have realized that the Court is saying, well, wasn't -- was it not the burden of small resellers to show why they weren't fair and reasonable.

THE COURT: Well, only on one point. I'm not suggesting that you had any burden on the fair and reasonable nature of the rate. I think your -- you guys were implicated because of the motion to reopen with respect -- you were implicated on the issue of the impact that it would have on you and public interest. I mean, at least that's what Commissioner Schoenfelder, that was the basis for her motion anyway.

MR. RITER: When you look at the situation that all of us were faced with nine months ago, obviously the Public Utilities Commission was not satisfied with the evidence they had, that it justified the rate that it showed that the rate was fair and reasonable.

By the same token, they were -- they felt that there was not sufficient other evidence available for them to establish a rate and they had like more information. So it seemed logical to them and sitting back to me it seems logical to see that they said, let's reopen this, let's take some more evidence, let's make sure everything was proper and appropriate. And then US West said no, well if you do that we're going put in these rates anyway. And

1 what are the rates going to do my people, by the time we
2 are all done with everything, they can pay us back some
3 money, but what good does it do from a practical
4 standpoint when you get paid back something if you're
5 still barely hanging on to your business if you're hanging
6 on at all?

7 THE COURT: Look, I don't think the issue is what
8 good is it going to do or even is it fair. The question
9 is what does the statute say.

10 As I read the statute, if the Commission doesn't make
11 a decision in 180 days US West can implement the rate and
12 then you go through the process, determine the fair rate
13 and if it's not fair, they've got to refund. I mean, that
14 might not be fair, but it seems to me your remedy is with
15 the Legislature.

16 MR. RITER: I don't disagree with that, your Honor.
17 And as you pointed that out earlier to Mr. Welk, why
18 doesn't he go ahead and implement it right now? They've
19 got authority under this particular statute to do it.

20 Obviously, I think US West is acting under the same
21 sort of attitude that all of the people here today are and
22 that is that they want to proceed properly and
23 appropriately and frankly, they don't want to put hundreds
24 of thousands of dollars or millions of dollars at risk by
25 having to pay it back should there be some reversal at a

1 later time relative to that. And I'd like to think too
2 that US West is saying, we want to do what's ordered and
3 was fair and determined to be fair and reasonable by the
4 Public Utilities Commission. And that's why they haven't
5 unilaterally gone out and put some rate in even if they've
6 got the authority to do it.

7 We think that if the Court were to remand this case,
8 that the Public Utilities Commission perhaps could then
9 have the opportunity, if the Court allowed it, by the
10 remand to hear such evidence as might be appropriate to
11 determine whether or not the rate was fair and reasonable.
12 It would seem to us that if a remand was ordered that
13 would not have to be limited to the record existing, but
14 that the Court could also order that there be such
15 evidence.

16 We've got issues about Mr. Culp and whether or not
17 there was sufficient foundation for his testimony and
18 whether it should or should not have been accepted and
19 whether they were audited and verified. And certainly,
20 this would give US West the opportunity to come forth with
21 that evidence.

22 Additionally, it would allow our people the
23 opportunity, if the PUC thought there was additional
24 questions relative to the small resellers and how this
25 impacted them, they would have the opportunity to present

1 that evidence should the Court order a remand. And I'm
2 not suggesting that it did do so because obviously, it
3 would seem to me that US West would still have the
4 opportunity now to file an additional rate and ask for a
5 new docket to be open.

6 But -- and when we talk about where we are at this
7 time, if you look back at one of the records -- and we
8 mentioned it in our brief -- Mr. Heaston, who's the lawyer
9 from -- the lawyer Mr. Welk works with most generally,
10 stated in a letter to the PUC back in 1993, I believe,
11 that he thought that because how important -- I'm
12 paraphrasing and I don't have long and Mr. -- I'm sure Mr.
13 Welk will correct me if I don't get it close, but the
14 effect was we don't think that the rate ought to be from a
15 lower figure to a high figure in one step because of the
16 fact that this is such a significant expense upon the
17 resellers and such a -- plays such a significant portion
18 of their direct costs that the only fair way of doing it
19 is the phase in.

20 So the Public Utilities Commission back in '93
21 adopted this rate of 3.14 and during that period of time
22 from then until now, the US West never came forward and
23 said, let's phase in an increase based upon we'll go to
24 3.75, then we'll go to 4.25. They didn't even take the
25 advice of their own counsel at the time and suggest phase

1 in. Instead, they jumped right up to a rate that frankly,
2 is confiscatory as far as my people are concerned.

3 THE COURT: Well, their failure to do this in the
4 past, how is that relevant to whether there's substantial
5 evidence in the record to support a decision of no
6 increase?
7

that an increase such as US West has suggested is not fair
and reasonable and that the PUC was right not to accept US
West's requested increase. And they were right to close
the docket as opposed to accepting that if those are the
two alternatives available because even US West's own
people, own representatives, affirmed that in fact that
would be improper manner, at least arguably from our
standpoint, an improper procedure, improper way to
increase the rates to the point that they ultimately want
them to be.

Our people got -- why all this came about is US West
apparently because they've got the information necessary,
they computed what impact would be upon our various
resellers and supposedly they sent the same letter to
AT&T, MCI and Sprint and everyone else, but the resellers
got a letter from them saying with this new rate, by way
of access charge, your total access rates are going to be
up. And some were 78 percent and some of them were 129

percent.

We would argue from a public interest standpoint, from a standpoint of what is fair and reasonable, that the rate increase US West sought in this case was neither fair and reasonable nor was it in the best public interest, not only to our people, but to the competition that we have brought to the market place and the consumers that take advantage of the rates that are available to them by virtue of competition being there.

So accordingly, we would ask that the Court look at the issue and affirm the decision of the Public Utilities Commission. If the Court does order remand, we would ask that the Court order that the remand include issues that may not yet be -- that may not be in the record, but allow the record to be supplemented by additional evidence on the remand.

Thank you, your Honor.

THE COURT: Okay. Mr. Welk.

MR. WELK: I'm getting used to being by myself up here and having others argue against me and so I'm not going to go through every one of the points that have been made by the counsel because I think a lot of them have been addressed in the briefs.

Your Honor, you've asked time and time again of opposing counsel under the review that this Court is

mandated to do under 1-26, where is the substantial evidence to support the Commission's decision. And no one has given you an answer. Each one of the people that come up here and they talk about rate shock, they talk about that. Mr. Hoseck couldn't answer your question. And the question is very simple. There isn't any evidence to support the Commission's decision. What is in the record that is undisputed remains undisputed.

US West had the initial burden of going forward. It did along with the staff as you correctly pointed out. No one challenged the staff. The staff's testimony remains undisputed. And we met our burden of going forward.

Where is the rest? Where is the opposition at? At some point in time the burden must shift and we came forward with it. The staff came forward. The burden has got to shift. We came forward. We met the burden. The burden has got to shift to someone else.

THE COURT: Did you agree though that the Commission -- I mean, if they don't like -- if they're not comfortable with their numbers they at least have the right to investigate and do what kind of an exam --

MR. WELK: Sure they do.

THE COURT: -- they want to verify your numbers?

MR. WELK: They can go down, as the Court pointed out, and they do that time and time again. They don't

need a subpoena. All they got to do is pick up the phone and call down. But that's not what this is. This is an adjudicatory proceeding and if they want to go down there now and look at the numbers, do what they want to do and bring us back and say we didn't agree with that they can do that. But in this proceeding, we presented the evidence and nobody else presented their evidence.

It's very interesting listening to AT&T. They stood up with me at the time and said we don't need another hearing. Now they're talking about remand, going back and all that. Sprint and these other companies, they never even ran the cost model. I mean, what do these rules mean if you can't at least abide by the methodology.

And like I said before, you do have a dispute between 6.14 and 5.5 and that's what these rules contemplate. But the Commission, as you correctly pointed out, said no, no rate increase. What's very interesting is none of the companies told you, your Honor, they have known, they have feasted off this rate of 3.14 for three years.

And Mr. Riter is right. Mr. Heaston did write a letter back in '93 and said, yes, if we move this up to a 6 rate based on the '93 cost study, it would be rate shock. And US West said, let's start phasing it in. Well, the problem is 3. -- it's been 3.14 for three years. They've had this rate. They've had their phase in. They

should have known and these are reasonable, prudent business people. Everybody knows that, your Honor, on reseller standpoint this is their big cost of business. I mean, since the day you get into business, they know that.

And some of the contracts that they have, they've allowed for increases. I've asked in cross-examination at the hearing, don't you provide that when a major one of your inputs goes in, you can reprice. They said, yeah, we can reprice. We don't know what's going to happen.

All these were issues that are not relevant to the situation of whether the evidence was presented by US West. We've said the evidence is there. Where is the Commission's evidence other than some concern?

I do want to talk about the public interest situation again. The Commission is a statutory body. It has to go by what the Legislature said. In setting these rates, there is no discussion about public interest. Is there in the regulation regarding phase in, yes. There is a discussion, the phrase is in their public interest, but the Commission chose not to get into phase in. They didn't want to talk about it. They just said no, case dismissed. They willy-nilly are going around doing things without having some basis in law. And it is not necessary in every proceeding of the public utilities. They must look to the statutory law that the Legislature gave them.

i could continue and we could go back and forth forever on this, your Honor. I think you've understood the record. This is a point where the Commission had some concerns at the end, but they had no evidence to support rejection entirely.

And I'm very concerned on the remand, your Honor, if you decide to remand it what the scope of the hearing will be. We will argue interminably when we get back down before the Commission about what is the scope. So it's very important that you define, if you're going to remand, what the scope is. We're going to have to try to litigate, relitigate all this stuff again. We did it once. The remand ought to say you had a rate, it's between these two rates and that ought to be the limitation.

If they want to go out and change their rules, if they want to come down and investigate, they can do that. But this proceeding -- we have proceeded through a 1-26 judicial review. They don't get a second bite at the apple. Otherwise, this thing is going to go on interminably, and my client is entitled to get a fair rate. It hasn't got a fair rate. We've been asking since almost a year ago based on the most current cost study and we respectfully request, your Honor, if you remand it that you do so with instructions that it be confined to this

MR. WELK: I don't think the record needs to be reopened.

THE COURT: Well, I understand that. I know you don't want it reopened, but what I'm saying is the order that I'm considering today is the order granting AT&T's motion to disapprove and close the docket. If that's reversed, aren't you back to the position that you were before where the Commission had moved to reopen to hear additional evidence? Isn't that the stage it should go back to?

MR. WELK: You can say that, but what other additional record do you want? What is going to be defining. What is going to be at that hearing? Are we going to hear all the same argument? Are we going to go back through the same thing we did before.

The basis for these rules -- and I keep going back to that -- was this interminable process wouldn't exist and

CONNIE HECKENLAIBLE, RPR

all you're doing is further delaying the process. And none of these people care.

THE COURT: You can implement. Why don't you go back and implement 5.55?

MR. WELK: We can do that. We can go back and implement 5.5 if you say that's the rate we're entitled to.

THE COURT: Well, I'm not going to say that. I can tell you that.

MR. WELK: If you say the rate is between 5.5 and 6.14, then we got some degree of certainty where it's going to be. These decision you're making are affecting millions of customers and people and we take these decisions very seriously. And we take these -- this Court and the Commission's decisions very seriously. And we would rather deal with the Court's decision, but if you send us back in limbo, I'll tell you it will be another six to -- six months and we'll be back here again if it isn't defined because now on the other case that you sent back on Cheyenne River, we're doing the same thing. Millions were heard on the record, and it just sends us into interminable harassment unless you're clear on what you say should be done, what the evidence ought to be and then we argue about what your order is.

And that's what I don't think my client should have

to do having waited a year. I mean, the Commission has the authority to suspend the rate for 180 days. They took -- they are going to continue on that, and I don't think that's fair and what's anticipated. They should make the decision promptly. There isn't anything more than that they need to do and hear this evidence all over again.

THE COURT: This is like a big stakes poker game with this implementation statute. I mean, if you want to stick your neck out, you can do that.

MR. WELK: Yes, we can do that.

THE COURT: So I mean --

MR. WELK: I think the prudent thing -- if we want to play high stakes poker we can. We would prefer to work with the Court and the PUC. That's the type of corporation it is, but if we have -- we have the right to go ahead and do that. I would like to be able to tell my client the Court believes this. Otherwise, we're going to go back and argue about what the procedure rule means, what is the hearing we can continue on.

Now we're at a year, year and-a-half and my client continues to provide service to all these companies at an unreasonably low rate, which everybody in this room couldn't beat. You're forcing my client to continue to furnish that service at an unreasonable and confiscatory

rate. Sometime US West's consideration has to be made here. And we have waited, we have gone through the hearings, and everybody else is going to come up with some sort of reason why we have three more hearings and more evidence because it's in their interest to do so.

And I just request, your Honor, that you be specific on a timetable that this matter get done and in fairness to my client, I think that's reasonable. I have nothing further.

THE COURT: Okay. Well, since -- because of the continuation of this case, I've had two opportunities to prepare. I'm going to give you a bench decision.

The matter before the Court is an appeal by US West from a Commission decision including Findings of Fact and Conclusions of Law which granted AT&T's motion to disapprove the rate increase and close the docket, which is essentially a motion to dismiss. The effect of that ruling was to deny US West any increase in its switched access rates.

I think some historical recitation should be in the record on my part at this point. On June 24, 1996, US West filed for the approval to increase the rates. The Commission permitted intervention by numerous parties who have been -- who are all here and represented in court today. Maybe -- well, Dakota Cooperative may not be, are

they?

MR. WELK: They're not here, your Honor.

THE COURT: Yeah. With their exception -- and Express is not here.

MR. WELK: They withdrew, your Honor.

THE COURT: Okay. With those exceptions, the other parties have argued today.

Now, historically, it appears that under the statute 12.4, the Commission suspended the proposed rate increase and scheduled a hearing for October 9 and 10. After that hearing and after the Commission heard the evidence, the Commission moved to reopen the record to take additional evidence. Thereafter, US West advised the Commission that it believed the existing administrative record supported its application and that it did not intend to offer additional evidence.

At approximately the same time, US West advised the Commission that because of -- that because the hearing on the Commission's motion to reopen would not take place until after the expiration of the statutory 180-day time period, US West was going to exercise its statutory right to unilaterally impose the proposed change. That right is set forth in 49-31-12.4(5).

The next thing that occurred is on January 16, 1997, before the scheduled rate -- or excuse me, before the

scheduled date of hearing to take the additional evidence, AT&T moved to disapprove the application and close the docket. After a further hearing, AT&T's motion was granted and the Commission entered Findings of Fact and Conclusions of Law, which are the subject of this appeal.

Now, this appeal, as I see it, involves the question of whether the Commission properly or improperly granted the motion to disapprove and close the docket or dismiss without determining a fair and reasonable rate based on the evidence in the record. The issue is whether or not there is substantial evidence in the record to support the Commission's ultimate decision that US West was not entitled to any increase because that's the effect of what occurred by granting the motion to dismiss.

At the outset, there's a dispute among the parties about the correct standard of review. One side argues that -- or the Intervenor primarily argue that this is a question of fact or mixed question of fact governed by the clearly erroneous standard. US West argues that it's a mixed question of fact and law that is based -- or that's really a de novo review because the historical facts are undisputed and the Commission's determination was to determine the legal effect of the evidence.

This Court concludes that ultimately, the PUC decision to determine a fair and reasonable rate is a

1 factual determination, which is within the expertise and
2 experience of the Commission, and consequently, is a
3 factual review or matter which should be governed by the
4 clearly erroneous standard.

5 Now, getting to the law that applies, SDCL 49-31-12.4
6 governs the proceedings before the Commission.

7 Subdivision 1 of that statute provides that the Commission
8 may upon a petition enter into a hearing concerning the
9 propriety or reasonableness of the proposed increase.

10 Subsection 3 provides that during that hearing the
11 Commission may receive, "whatever evidence, statements, or
12 arguments the parties may offer pertinent to the
13 investigation." Although, the burden is clearly on the
14 company to prove that the imposed rate is fair and
15 reasonable.

16 Subsection 4 specifically provides that after the
17 hearing, the Commission has a duty to, "determine a fair
18 and reasonable rate, render a written decision
19 specifically setting out the rate or price and prepare a
20 record of its proceedings."

21 If a company exercises its statutory right to
22 implement a rate, subsection 5 then provides that upon
23 completion of the hearings and entry of a Commission
24 decision, the Commission may require that the company
25 refund with interest the portion of the "increased rates"

found to be fair -- excuse me -- unfair or unreasonable.

Now, in determining -- in making these determinations, the Commission has adopted a computer model to assist in determining what is a fair and reasonable rate. These rules dictate the methodology by which the rates are to be determined. US West's cost study utilized that model. It suggested a 6.4 cents per minute rate.

The PUC staff took issue with, as I read it, approximately nine of the inputs used by US West in that model. Nevertheless, the PUC's own staff made adjustments itself and determined and testified essentially that a fair and reasonable rate was the 6.15 rate. In addition, the evidence in the record reflects that the other people that have these -- or other companies in South Dakota that have these rates have established rates -- access rates it looks to me like ranging between 7.04 cents going all the way up the ladder to there's some -- a couple 8's, a 9 and even a 10 cent rate.

Now, the Intervenor's objected to US West's proposal and inputs. They did not submit quantifiable evidence concerning what a fair and reasonable rate was. Instead, the Intervenor's criticized various rates and inputs -- various inputs, I should say, that were used by US West in the computer model. US West then came back in their

rebuttal case and although they didn't agree with those criticisms, they demonstrated that if the criticisms were valid -- and that is the criticisms of the inputs -- that the rate, even assuming those criticisms to be valid, would be 5.55 percent -- 5.55 cents, excuse me.

Now, at the hearing, US West agreed to the staff recommendation of 6.15. They did not agree to the 5.55 at the hearing, but they have agreed to that before the Court today and asked the Court to set the rate at 5.55.

In analyzing this case, the Court must take into consideration the fact that a majority of the Commission determined that they were uncomfortable essentially with two things. And because of that, they moved to reopen the record to take additional evidence. As I read the record, there were five concerns of the majority. Those concerns, however, really fall into two groups.

Essentially, the first group is that the Commission was uncomfortable with the reliability of the inputs used by US West in the computer model. The second group of concerns was that the majority of the Commission was concerned about the effect that the rate increase on small resellers might have. The Commission, however, never pursued either of those concerns because it granted AT&T's motion to disapprove the application and close the docket.

Now, as I've indicated before, that means the issue

Before this Court is the propriety of granting that motion. The Commission has entered extensive findings and conclusions to support its decision, but I think when you look at it, it really comes down to two reasons in those findings why they granted the motion.

First, the Commission found that US West's proposed switched access rates were not in the public interest. That finding was made in Finding of Fact XXIII. The second reason is set forth in Findings XXIV, XXV, and XXVI. There, the Commission found that US West's inputs into the cost study were not adequately verified and as a result, the computer model -- let me try to -- could have produced an incorrect mathematical result.

In the process of doing that, they also found that US West's witness -- prime witness on this issue, Mr. Culp, was not credible. Ultimately, then the Commission found that US West had not met its burden of proof that a 6.15 percent -- cent rate was fair and reasonable. However, the Commission did not determine a fair and reasonable rate or render a decision specifically setting out the rate. Rather, it simply granted the motion to dismiss before the implementation date of US West's proposal.

This Court, after considering the record and evidence, believes that the matter must be remanded for a number of reasons. First, the Commission's Findings of

Fact that US West's proposed access rates are not in the public interest is not supported by any Findings of Fact to indicate how that ultimate finding was made as is required by In Re SDDS. Now, the Commission and the intervenors in their briefs point out various theories upon which a public interest finding could be sustained. However, under SDDS, this Court may not search the record and speculate whether these various theories are the ones which support that finding.

More specifically, there's been argument to the Court that the impact on the other resellers, the other purchasers, sustain a public interest finding. There's the arguments about rate shock and that is mentioned in the Commission decision. However, in the ultimate finding, they simply conclude -- or the Commission simply concludes that it's not in the best interests, but they don't indicate what the underlying findings are to support that finding -- that ultimate finding.

And as a consequence, if nothing else, the case has to be remanded for the Commission to indicate the findings that it believes makes no rate increase in the public interest. SDDS requires that the Commission must reflect the actual reasons for that ultimate finding. In the absence of the underlying findings, this Court is left to speculate if those are the sole reasons or if they are

the reasons for the Commission's ultimate finding. So on remand on that issue, the Commission must articulate the underlying factual reasons for its public interest finding.

Now, in doing so, this Court wants to note that I am not deciding today whether or not the public interest is a factor which the Commission may, as a matter of law, consider. Because the matter is being remanded, that issue may be further considered on further appeal once an adequate factual record is established so this Court can adequately review it.

The matter must also be remanded because of the way the Commission disposed of the arguments concerning the accuracy and reliability of US West's inputs. At the outset, it should be noted that there's no issue that US West complied with all accounting standards and administrative rules for completion of the cost study that were in existence at the time of the hearing. Although the intervenors and Commission members were concerned about the accuracy and reliability of the inputs, the unrefuted rebuttal testimony reflected that if all those criticisms were considered, US West was still entitled to a 5.55 cent rate.

More importantly, although two of the commissioners had concerns about the reliability and accuracy of the

inputs, the Commission did not find that any of the nine inputs at issue -- I should say any of the specific inputs at issue were unreliable. And very significantly, the Commission did not find that the -- any of the inputs -- and I should say the corrected inputs or adjusted inputs used by its own staff analysts were flawed, were inaccurate or were unreliable.

It's true that they did express concern about some of the underlying data not being under oath, but there's no finding rejecting the testimony of Knadle, Best, or Sislov's analysis. And I think it's important to indicate here what that testimony is. The Court has read the proceedings before the Commission and I note that -- I hope I'm pronouncing this right, is it Knadle?

MR. HOSECK: Yes.

THE COURT: Mr. Knadle, a utility analyst for the Commission staff, testified about the appropriate rate. There were three of them that did. They did this as a joint project and all agreed that this 6.15 was an appropriate rate.

Now, more specifically, Knadle testified as to some of the inputs. I forget, but one of them had four and one of them had five and then one of them kind of summarized it. But Knadle was specifically asked whether he had considered the cross-examination of Culp and the testimony

of Parker, which was the witness who criticized US West's inputs, and he did not change his pre-filed testimony in spite of AT&T's cross-examination of Culp and the testimony of Parker.

It's also significant to note that he considered not only the cost study provided by US West, but other information that he felt necessary to feel comfortable with a fair and reasonable rate that he obtained from US West. The bottom line is that he did not testify that the underlying information was inadequate.

So also, Harlan Best, another analyst with the staff, testified as to five of the other -- five other considerations that -- or adjustments that the Commission staff was concerned about. In his testimony before the Commission he adopted his pre-filed testimony, which essentially indicated that the cost study as adjusted complied with the Commission rules and at 6.15 cents was appropriate. Although there's an argument about whether the underlying information was under oath and whether it's secondary information or whatever, he testified that he relied on the ARMIS report, that he used the monthly reports that US West is required to file, and that even though he considered Culp and Parker's testimony, that did not change his recommendation.

Finally, Greg Rislov, another analyst with the

Commission, testified as to four other adjustments and issues that were in dispute. And despite the Parker testimony, which he had read, he adopted his pre-filed testimony and -- which essentially in consultation with the other two, recommended a 6.15 cent rate.

So what you have here is a record wherein these -- this evidence presented by these three analysts is not rejected by the Commission. Nevertheless, US West -- or excuse me, the Commission today argues to this Court in its briefs that there is an evidentiary shadow on the cost study because of the cross-examination of Culp and the other criticisms of the inputs raised by AT&T.

However, I think it's extremely significant that the Commission essentially admits in its brief or concedes that, "Depending on what cost study or whose analysis it -- meaning the PUC -- would believe, the switched access rate ranged from 6.4 cents per minute to 5.55 cents per minute." That's PUC Brief at pages 10 through 11.

This admission clearly demonstrates to this Court that there is the existence of a range of substantial evidence justifying some increase. The Commission, however, in granting what's equivalent to a motion to dismiss, in my opinion, failed to follow its statutory duty to "determine a fair and reasonable rate or price, render a written decision specifically setting out the

take and prepare a record of its proceedings."

This Court acknowledges that the motion was granted because US West indicated that it would not present any additional evidence to support its application in the hearings. However, that application -- or that action of US West did not relieve the Commission of its responsibility to determine a fair and reasonable rate. That duty arises not only from section 12.4, but also from the general powers and duties of the Commission under section 7.1.

Under that statute, the Commission is given explicit power to obtain from US West "full and complete information necessary to enable it to form the duties and carry out the objects for which the Commission was created." The Commission also has explicit authority to require reports which, in the opinion of the Commission, it finds necessary or proper for its information. The Commission may prescribe the forms of any and all accounts, records, and memoranda to be kept by US West. And they specifically may inspect all accounts, records and memoranda kept by US West.

Moreover, the Commission may employ special agents or examiners to examine any and all accounts, records and memoranda used by US West including the right to examine books, papers, documents and employees of the company.

Finally, the Commission is given specific subpoena power to compel the attendance and testimony of witnesses and the production of books, papers, tariffs and documents relating to any matter under investigation.

It's evident on reading this record that the Commission staff requested the information it deemed necessary to determine a fair and appropriate rate. The Commission, however, did not. Rather, it simply dismissed the ~~matter~~ or the application. It did so because the Commission's findings reveal, at least in my opinion, a potential problem with the inputs used by US West and its own staff witnesses.

Again, however, the Commission did not find that its own staff's witnesses were unreliable, unbelievable or not credible. And in the absence of such a finding, the only "substantial evidence" on this record supports some kind of an increase, using the Commission's own words to this Court. "Depending on what cost study or whose analysis the FCC would believe, the switched access rate ranged from 4.4 cents per minute to 5.55 cents per minute."

This shows to this Court that there is substantial evidence to support some rate increase. However, I've repeatedly asked today what evidence there is to -- what substantial evidence there is to purport -- to support no increase and no one has been able to identify any such

evidence to this Court. Now, the Commission and
 intervenors further argue that further hearings were
 useless because US West did not intend to introduce
 further evidence. Again, I believe this overlooks the
 Commission's statutory duties and responsibilities. Under
 those duties and responsibilities, the Commission
 certainly had the authority to reopen this record as it
 did to satisfy itself on the five concerns expressed at
 the December 9 meeting.

My decision is not intended to imply that the
 Commission, if not satisfied with numbers, cannot inquire
 into those matters. They clearly have that power.
 However, the five concerns that were -- that are in this
 record are number one, whether the depreciation was
 inadequately explained and unresolved; number two, whether
 there was a lack of quantification by small resellers of
 the effect of the proposed rate increase on their
 membership; number three, whether small resellers had
 presented sufficient alternatives to the cost model
 results; number four, what the effect of the size of the
 rate increase on small resellers would be; and five, a
 concern over the lack of verification of numbers which
 went into the cost model.

I think, however, -- at least in my opinion, however,
 it was not useless to proceed for two reasons.

First, as I previously indicated, in the absence of a finding by the Commission that its own staff witnesses are not credible, are unreliable and that their testimony is totally rejected, I don't believe US West was obligated to provide additional evidence on concerns one and five. At that point, the record, in the absence of a finding or a rejection of their testimony, there was evidence in the record as the Commission's brief to this Court concedes, because there was a range of evidence before the Commission.

If the Commission is uncomfortable with the inputs on concerns one and five, as I've previously indicated, it has more than adequate authority to obtain that information from US West. If the Commission on remand believes that US West's numbers really need what's been described as scrubbing, the Commission has the authority to accomplish that task. And as I've already indicated two or three times, in the absence of a finding that the RUC staff testimony is rejected, the Commission has a duty then under 12.4 to determine the appropriate rate that's based on the evidence in the record.

The second error on this issue of reopening the record because of these concerns is that the other concern on factors two, three and four really weren't US West's obligation to satisfy. Under those concerns, those were

concerns about the resellers' failure to present evidence. And there may be rate shock and public interest matters to be considered here, but under the Commission's own order to reopen -- or the motion to reopen, the Commission's dismissal of the docket was not warranted by the failure to produce evidence on factors two, three and four. That wasn't US West's obligation. That was the obligation of the others. Findings of Fact -- or Finding of Fact XXVIII clearly reveals that these issues involved evidence which only the Intervenor could produce and US West simply need not be faulted or penalized for failure to produce evidence on those issues.

So for all these reasons, I'm going to conclude that the granting of AT&T's motion of disapproval was in error. As I view it, that leaves this matter before the Commission with an open docket and a motion to hear additional evidence on the five factors that are present.

It will be the order of the Court that the matter be remanded to the Commission for further proceedings not inconsistent with this opinion. The matter is remanded with the express opportunity of the Commission to conduct its investigation as it deems appropriate under its motion to reopen the record and -- but ultimately, the matter is remanded to the Commission to carry out its statutory duty to "determine a fair and reasonable rate, render a written

decision specifically setting out the rate, and prepare a record of its proceedings."

Mr. Welk, you should prepare an order of remand consistent with this -- maybe it would just be easier to incorporate this decision.

MR. WELK: May I ask some questions, your Honor, about what your remand order means because we're just going to be back arguing this again.

THE COURT: Well, what I've tried to say is, as I view it, the issue before the Court today is whether or not the motion to dismiss -- the motion to disapprove and close the docket was inappropriate. I think it was. The Findings of Fact and Conclusions of Law don't support it for the reasons I've indicated. And I think if the Commission -- I think if the Commission is genuinely concerned about the numbers and it wants to scrub numbers, it's got the power to do that and it should do that because that's its duty and obligation under the statute. And I also think that if you want to implement your rate you can implement your rate. It seems to me that's where we're back to when the -- when the motion to disapprove is overruled.

MR. WELK: Well, my questions, your Honor, go to does this give the Commission the opportunity to go over all of the evidence that has been presented or is it that the

hearing that may be held limited in scope to what the concerns were at the time that the motion to reopen, which you've already gone through and talked about? What is the scope of the remand hearing going to be, and what are we going to do at the hearing to implement your order?

THE COURT: Mr. Welk, I can't give you an answer to that. I think this is an -- the Commission is empowered to make these decisions. They made -- they moved to reopen the record. I think if they're uncomfortable with the numbers, they've got that right. And I understand your concern, but I don't think I -- I don't think it's a judicial function to tell the Commission on remand how to conduct its business.

MR. WELK: Can we at least, your Honor, have the order for remand dictate when this matter ought to be concluded in light of the fact that this matter has been over one year since the application has been filed.

MR. HOSECK: May I speak to that, your Honor?

THE COURT: Yes, Mr. Hoseck.

MR. HOSECK: In doing that, and if the Court does that, the thing that I would ask is that if the Commission on remand goes for a scrubbing of these numbers, this may be a time consuming process.

Now, I don't think that anybody can say that this has been unduly delayed in those processes, but I think that

there's a practical consideration here that if the Commission orders an audit or some sort of verification, whether by its own staff or whether it requests this information of US West, that this is going to take some time. That's the only point I'd like to make.

THE COURT: Well, I don't -- I understand your concern, Mr. Welk, but I don't believe that I have authority to tell the Commission to act within a certain number of days. I mean, I would obviously encourage them to act as reasonably quickly as they can. I don't know what they're going to do. And as I've indicated, I think they've got the right to further investigate this.

The other side of the coin is, you know, US West, everybody in this room, I think are big -- well, maybe not big companies, but you've got the right to implement the rate and at least, you know, that's -- maybe that's an advisory opinion, maybe that's subject to argument, I don't know. And if it is, I don't mean to express an opinion today that that is the law, but in just reading the statute it seems like that's what everyone here today kind of agreed. But you've got the right to implement the rate, but they should act, I mean, forthwith. That --

MR. WELK: I would just like some direction, your Honor, in light of what has happened here because we're going to get into the issues, I'm telling you right now,

we already started doing this in the last hearing about who's going to pay for this. The staff is satisfied. You know, apparently they were at the hearing. So whatever the Commission wants to order, whose going to pay for it. The rest of these people, we're going to go back and we're going to discuss. But I at least want some direction that the Court has said act, you know, forthwith to get this matter done. I think I'm entitled to that for my client.

THE COURT: Forthwith. How's forthwith?

Anything else?

Okay. We'll be in recess.

MR. RITER: Thank you, your Honor.

MR. MOSECK: Thank you.

(Conclusion of Hearing.)

STATE OF SOUTH DAKOTA)


) SS

CERTIFICATE

COUNTY OF HUGHES)

I, Connie Heckenlaible, Official Court Reporter and Registered Professional Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Oral Argument contained on the foregoing pages 1 through 90, inclusive, were reduced to stenographic writing and thereafter transcribed; that said proceedings commenced on May 16, 1997, in the Courtroom of the Hughes County Courthouse, Pierre, South Dakota, and that the foregoing is a full, true and complete transcript of my shorthand notes of the proceedings had at the time and place above set forth.

Dated this 2nd day of June, 1997.


Connie Heckenlaible, RPR
Official Court Reporter

USWEST
COMMUNICATIONS @

125 South Dakota Avenue, 8th Floor
Sioux Falls, South Dakota 57194

May 20, 1997

RECEIVED

JUN 6 1997

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Mr. William Bullard, Executive Director
Public Utilities Commission
State Capitol Building
Sioux Falls, South Dakota 57501

Dear Mr. Bullard:

This is to advise the Commission that as a result of Judge Zinter's decision dated May 27, 1997 in the Switched Access case (TC96-107), which reverses the Commission's January 31, 1997 decision to dismiss U S WEST's filing, it is U S WEST's intent to implement the rates filed to be effective August 1, 1996 on June 13, 1997. The combined rate in that tariff is 6.4¢ per minute.

Although the record before the Commission, as acknowledged by Judge Zinter, has a rate range of 5.5¢ to 6.1¢, we believe that under SDCL 49-31-12.4 we can only implement the filed tariff rate of 6.4¢.

U S WEST anticipates making an amended filing subsequent to any PUC decision in this docket that would alter the originally filed rate. The Interexchange Carriers will be notified of our June 13, 1997 effective date.

Sincerely,

for Lehner
John Lehner
Director Regulatory Affairs

CC: Service List Attached

Service list for 97-107

Georgia Hosenok, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

773-3201
773-3809 fax

John S. Levald
Ginger, Levald, Robbenolt & McCahren P.C.
117 East Capitol Avenue
Pierre, SD 57501

224-8851 AT&T
224-8269 fax

David A. Gerdies
Robert K. Sahr
May, Adams, Gerdies & Thompson
502 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

224-8803 MCI
224-6289 fax

Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
223 East Capitol Avenue
P.O. Box 626
Pierre, SD 57501

224-1500 Sprint
224-1600

Robert G. Marmet
Marmet and Armstrong
P.O. Box 260
Grenville, SD 57014

563-2001 Dak. Co-op
263-3995 fax

David Pfeiffer
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 380
Pierre, SD 57501

224-5826 Midco
224-7102 fax



8140 Ward Parkway
Kansas City, MO 64114
Telephone: (913) 624-6865
Fax: (913) 624-5681

General Counsel
Regulatory Division
Central Region

June 2, 1997

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JUN 10 1997

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

William Hubbard
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave
Pierre, SD 57501

FAX Received JUN 02 1997

BY FAX AND U.S. MAIL

Re: US West Access case
Docket No. TC 96-107

Dear Mr. Hubbard:

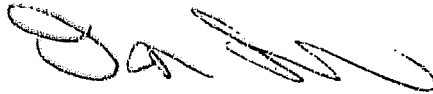
This is Sprint's response to the letter of U S WEST, dated May 29, 1997, advising you that U S WEST intends to implement its proposed 6.4 cents per minute composite switched access rate on June 13, 1997. U S WEST purports to justify implementation of the rate under SDCL 49-31-12.4 and Judge Zinter's decision remanding the PUC decision.

Sprint does not believe that U S WEST has any legal authority to implement an increase in access rates prior to further Commission decisions in accordance with the Court's decision. SDCL 49-31-12.4(5) clearly does not apply once the Commission has rendered a decision on the merits of a proposed rate change. It is evident from the wording of the statute that it is intended to allow rates to go into effect only on an interim basis (subject to refund with interest) pending a Commission decision. Once the Commission renders a decision, that decision surely governs which rates are deemed reasonable. Although the Commission decision may be affected by a court determination on appeal, rate changes should obviously be implemented only in accordance with the decisions of the court and, in remand, of the Commission. There is no hint in SDCL 49-31-12.4 that that statute is intended to interfere with the appellate review process by allowing for a change in rates which conflicts with the Court's or Commission's findings.

Furthermore, Judge Zinter's written decision unambiguously requires the Commission to determine a fair and reasonable switched access rate. There is no suggestion in the Court's decision that U S WEST is entitled to impose an interim increase in rates before the Commission has complied with that judicial directive.

~~Company~~ Sprint hopes that the Commission will inform U S WEST that it may not
~~implement its threatened~~ increase in access rates.

Very truly yours,



Donald Low

cc: Mr. Harmon, US West
Records of record
Cathy Harmon & Tom Harmon

Of Counsel
John R. McDowell

J. W. Boyce (1884-1915)
John S. Murphy (1924-1966)

RECEIVED

JUN 09 1997

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

**Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
222 East Capitol Avenue
P.O. Box 626
Pierre, SD 57501**

Robert G. Marnet
Marnet and Armstrong
P.O. Box 269
Centerville, SD 57014

**David Pfeifle
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501**

100

Sincerely yours,

BOYCE, MURPHY, McDOWELL
& GREENFIELD, L.L.P

Tamara A. Wilka
Tamara A. Wilka

[illegible]

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

:SS

COUNTY OF HUGHES

)

SIXTH JUDICIAL CIRCUIT

S S WEST COMMUNICATIONS, INC.

CIV. 97-50

Appellant.

NOTICE OF ENTRY
OF AMENDED ORDER
OF REMAND

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA


Appellee.

PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA AND
DAVID H. HOSACK, STAFF COUNSEL OF THE COMMISSION; RICHARD TIESZEN
AND THOMAS H. HARMON, COUNSEL FOR SPRINT COMMUNICATIONS
COMPANY L.P.; DAVID GERDES AND ROBERT K. SAHR, COUNSEL FOR MCI
TELECOMMUNICATIONS CORPORATION; JOHN S. LOVALD, COUNSEL FOR AT&T
TELECOMMUNICATIONS OF THE MIDWEST, INC.; DAVID A. PFEIFLE AND ROBERT C.
MYER, COUNSEL FOR TELECOMMUNICATIONS ACTION GROUP; and ROBERT
MCMURRY, COUNSEL FOR DAKOTA COOPERATIVE TELECOMMUNICATIONS, INC.

Notice is hereby given that an Amended Order of Remand, a copy of which is attached hereto,
was entered and filed by the Court on the 22nd day of May, 1997, in the office of the Clerk of

Court of Hughes County

Dated this 11th day of May, 1997.


Tamara A. Wilka
BOYCE, MURPHY, MCDOWELL
& GREENFIELD
P.O. Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424

Attorneys for Appellant

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) SS
)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

U S WEST COMMUNICATION, INC.,

Appellant,

-vs-

PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA,

Appellee.

CIV. NO. 97-50

AMENDED
ORDER OF REMAND

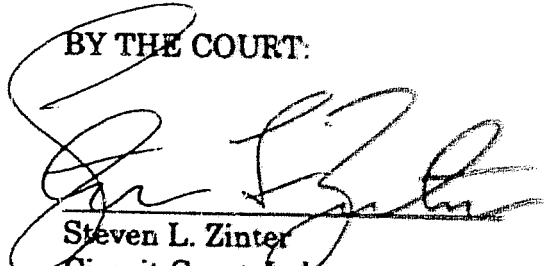
This matter came on for a hearing before the Honorable Steven L. Zinter, at the Hughes County Courthouse, Pierre, South Dakota, on May 16, 1997. The Appellant, U S West Communications, Inc. (U S West), appeared through its attorneys, Thomas J. Welk and Tamara A. Wilka. The Appellee appeared through Camron Noseck. The following Intervenor appeared through their respective counsel: Sprint Communications Company L.P., Thomas H. Harmon; MCI Telecommunications Corporation, Robert K. Sahr; AT&T Communications of the Midwest, Inc. (AT&T), John S. Lovald; Telecommunications Action Group, Robert C. Riter and David Pfeifle. The Court has considered and reviewed the entire record in this proceeding including the briefs submitted by counsel, as well as the oral arguments. In addition, the Court entered an oral bench decision on May 16, 1997. Now, therefore, it is hereby

ORDERED that the Order and Notice of Entry of Order dated January 31, 1997 entered in The Matter of the Establishment of Switched Access Rates for U S West Communications, Inc. (TC 96-107) of the south Dakota Public Utilities Commission (the Commission) granting AT&T's motion to deny U S West's switched access rate increase and to close the docket is reversed and remanded pursuant to SDCL 1-26-36 on the grounds stated in the Court's oral bench decision, which is incorporated by reference as if specifically set out herein. It is further


ORDERED that the Commission, pursuant to SDCL 49-31-12.4(4) shall determine forthwith a fair and reasonable switched access rate for U S West and render a written decision specifically setting out the rate and prepare a record of its proceedings and findings.

Dated this 29th day of May, 1997.

BY THE COURT:


Steven L. Zinter
Circuit Court Judge

ATTEST:


Mary L. Erickson
Deputy Clerk

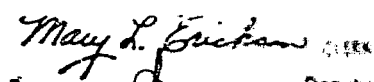
(SEAL)

CC Counsel of Record

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

MAY 29 1997


By Mary L. Erickson Deputy Clerk

CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 31st day of May, 1997, I sent a true and correct copy of the Notice of Entry of Amended Order of Remand, together with a copy of said Order, to the following by US mail, postage prepaid thereon to the following addresses:

Cameron Haseck, Staff Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Ira S. Lovald
Ginger, Lovald, Robbenolt &
McCahren P.C.
117 East Capitol Avenue
P.O. Box 66
Pierre, SD 57501

David A. Gerdes
Robert K. Sahr
May, Adam, Gerdes & Thompson
303 South Pierre Street
P.O. Box 160
Pierre, SD 57501-160

Richard P. Tieszen
Thomas H. Harmon
Tieszen Law Office
222 E. Capitol Avenue
P.O. Box 626
Pierre, SD 57501

Robert G. Marnet
Marnet & Armstrong
P.O. Box 269
Centerville, SD 57014

David Pfeifle
Robert C. Riter
Riter, Mayer, Hofer, Wattier & Brown
P.O. Box 280
Pierre, SD 57501


Tamara A. Wilka

U.S. WEST, Inc.
1901 Broadway, Suite 5400
Denver, Colorado 80202
303.733.4000
FAX 303.733.4001

U.S. WEST

William P. Heaston
Senior Counsel

RECEIVED

VIA FACSIMILE AND OVER-NIGHT DELIVERY

JUN 17 1997

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

June 17, 1997

Mr. William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: Prices for Switched Access - Docket No. TC96-207

Dear Mr. Bullard:

Enclosed for filing in the above-referenced docket is an original and nine (9) copies of U.S. WEST Communications, Inc.'s FINAL Access Service Tariff.

The tariff package which was forwarded to you via facsimile and over-night delivery on June 16, 1997, were drafts. Therefore, please replace the enclosed tariff package for those dated June 16, 1997.

Please file stamp an extra copy, enclosed, and return to me in the enclosed self-addressed stamped envelope. Thank you.

Yours truly,


William P. Heaston

Enclosures
WPH:mcb

U S WEST COMMUNICATIONS, INC.

Access Service

Tariff

SECTION 1

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Release 2

Effective: 6-13-97

State of South Dakota

Issued: 6-16-97

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(D)

U S WEST COMMUNICATIONS, INC.

Access Service

Tariff

SECTION 1

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Release 2

Effective: 6-13-97

State of South Dakota

Exhibit 6-13-97

1. APPLICATION AND REFERENCE

1.1 EXPLANATION OF ABBREVIATIONS

HC	- High Capacity
Hz	- Hertz
IAM	- Initial Address Message
IC	- Interexchange Carrier
ICB	- Individual Case Basis
ICL	- Inserted Connection Loss
Kbps	- Kilobits per second
KHz	- Kilohertz
LATA	- Local Access and Transport Area
LIDB	- Line Information Data Base
Ma	- Milliampere
Mbps	- Megabits per second
MHz	- Megahertz
MOU	- Minutes of Use
MRC	- Monthly Recurring Charge
MTS	- Message Telecommunications Service(s)
MTSO	- Mobile Telephone Switching Office
NB	- Narrowband
NPA	- Numbering Plan Area
NRC	- Nonrecurring Charge
NTS	- Non-Traffic Sensitive
NXX	- Three-Digit Central Office Code
OTPL	- Zero Transmission Level Point
PAL	- Public Access Line
PBX	- Private Branch Exchange
PCM	- Pulse Code Modulation
PI	- Priority Installation
PLR	- Private Line Ringdown
POT	- Point of Termination
POTS	- Plain Old Telephone Service
PSP	- Payphone Service Provider
PR	- Priority Restoration
RCC	- Radio Common Carrier
RMS	- Root-mean-square
RSM	- Remote Switching Modules
RSS	- Remote Switching Systems

(N)

(N)

(N)

U S WEST COMMUNICATIONS, INC.

Access Service
Tariff

SECTION 1

Page 27

Release 2

Effective: 6-13-97

State of South Dakota
Issued: 6-16-97

1. APPLICATION AND REFERENCE

1.1 REFERENCE TO TECHNICAL PUBLICATIONS

- A. All service(s) offered in this document must conform to the transmission specification standards contained in this document or in the following Technical References.
- B. The following publications may be obtained from Bell Communications Research, Inc., Customer Services, 60 New England Ave., Room 1B252, Piscataway, NJ 08854-4196:

TITLE	PUBLICATION NUMBER
LATA Switching Systems Generic Requirements (LSSGR) Issued: January, 1995	FR-64
Operator Services Systems Generic Requirements (OSSGR) Issued: January, 1992	FR-271
Transport Systems Generic Requirements (TSGR) Issued: 1992 Edition	FR-NWT-000440
Ordering and Billing Forum-Multiple Exchange Carrier Access Billing (MECAB) Issued: June, 1994	SR-ILB-000983
Ordering and Billing Forum-Multiple Exchange Carrier Ordering and Design Guidelines (MECOD) Issued: May, 1994	SR-TAP-000984

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2. GENERAL REGULATIONS

2.1 DEFINITIONS (Cont'd)

Charge Number (CN)

The term "Charge Number" denotes the SS7 out of band signaling parameter which is equivalent to the 10-digit ANI telephone number.

C-Message Noise

The term "C-Message Noise" denotes the frequency weighted average noise within an idle voice channel. The frequency weighting, called C-message, is used to simulate the frequency characteristic of the 500-type telephone set and the hearing of the average subscriber.

C-Notched Noise

The term "C-Notched Noise" denotes the C-message frequency weighted noise on a voice channel with a holding tone, which is removed at the measuring end through a notch (very narrow band) filter.

Common Channel Signaling Access Capability (CCSAC)

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The term "Common Channel Signaling Access Capability" (CCSAC) denotes the interconnection between the Company's CCSN and a customer's CCSN.

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2. GENERAL REGULATIONS

2.6 DEFINITIONS (Cont'd)

Common Channel Signaling Network (CCSN)

The term "Common Channel Signaling Network" (CCSN) denotes a specialized digital signaling network separate from the regular message (voice) network which interconnects computerized switching systems and has access to special data bases.

Common Line

The term "Common Line" denotes a line, trunk or other facility provided under the Exchange and Network Services tariffs of the Company, terminated on a central office switch. A common line-residence is a line or trunk provided under the residence regulations of the Exchange and Network Services tariffs. A common line-business is a line provided under the business regulations of the Exchange and Network Services tariffs.

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Communications Systems

The term "Communications Systems" denotes channels and other facilities which are capable of communications between terminal equipment provided by other than the Company.

Customer(s)

The term "customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff, including both Interexchange Carriers (ICs) and end users.

Data Transmission (107 Type) Test Line

The term "Data Transmission (107 Type) Test Line" denotes an arrangement which provides for a connection to a signal source which provides test signals for one-way testing of data and voice transmission parameters.

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2. GENERAL REGULATIONS

2.1 DEFINITIONS (Cont'd)

Letter of Authorization (LOA)

The term "Letter of Authorization" (LOA) denotes the signed authorization form from a customer or agent of Public Access Line Service designating the primary IC (PIC) for interLATA access. (T)

Line-Side Connection

The term "Line-Side Connection" denotes a connection of a transmission path to the line side of a local exchange switching system.

Local Access and Transport Area (LATA)

The term "Local Access and Transport Area" denotes a geographic area established for the provision and administration of communications service. It encompasses one or more designated exchanges, which are grouped to serve common social, economic and other purposes.

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2. GENERAL REGULATIONS

2.6 DEFINITIONS (Cont'd)

Local Area Network (LAN)

The term "Local Area Network" denotes a network permitting the interconnection and intercommunication of a group of computers, primarily for the sharing of resources such as data storage devices and printers.

Local Calling Area

The term "Local Calling Area" which includes Extended Area Service (EAS) points, denotes a geographical area, as defined in the Company's Local and/or General Exchange Service tariff, in which an end user (Telephone Exchange Service subscriber) may complete a call without incurring MTS charges.

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2. GENERAL REGULATIONS

2.1 DEFINITIONS (Cont'd)

Pay Telephone

Denotes an instrument provided by a Payphone Service Provider that is available to the general public for public convenience and necessity. Pay telephones utilize Basic and Smart Public Access Line Service provided under the Exchange and Network Services Tariff.

Payphone Service Provider (PSP)

Denotes an entity that controls and incurs the costs of placement and maintenance of pay telephones.

Periodic Inspection

The term "Periodic Inspection", which applies only to Expanded Interconnection-Collocation Service as set forth in Section 21 following, denotes inspections conducted at irregular intervals of all or portions of the interconnector's transmission equipment and leased physical space, to determine that occupancies are authorized and are installed and maintained in conformance with the requirements in Section 21 following.

Permanent Virtual Circuit (PVC)

The term "Permanent Virtual Circuit" denotes a logical channel between two points on the network that is established by service order and available on a permanent basis. No call establishment, call termination, or network address is associated with a permanent virtual circuit.

Phase Jitter

The term "Phase Jitter" denotes the unwanted phase variations of a signal.

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2. GENERAL REGULATIONS

2.1 DEFINITIONS (Cont'd)

Premises

The term "Premises" denotes a building, portion of a building in a multi-tenant building or buildings on continuous property (except Railroad Right-of-Way, etc.) not separated by a public highway. It may also denote a customer-owned enclosure or utility vault located aboveground or underground on private property or on customer acquired Right-of-Way. Except for an end user that offers Telecommunications Services exclusively as a reseller, this term is not to be limited to one building, but applies as well to a complex, or campus-type configuration of buildings.

Primary IC (PIC)

The term "Primary IC" (PIC) denotes the Interexchange Carrier (IC) of choice as designated by an end user for business or residential service or a location provider for a pay telephone.

Prime Service Vendor

The term "Prime Service Vendor" denotes the status of the Company when contracting directly with the user of TSP service.

Public Access Line (PAL) Service

Denotes Basic and Smart Public Access Line Service available under the Exchange and Network Services Tariff of the Company for use with pay telephones.

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3. CARRIER COMMON LINE ACCESS SERVICE

3.1 DETERMINATION OF USAGE SUBJECT TO CARRIER COMMON LINE ACCESS RATES

Except as set forth herein, all Switched Access Service provided to the customer will be subject to Carrier Common Line Access rates.

3.1.1 DETERMINATION OF JURISDICTION

When the customer reports interstate and intrastate use of Switched Access Service, the associated Carrier Common Line Access used by the customer for interstate will be determined as set forth in 3.8.4, following, Percent Interstate Use (PIU).

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3.1.2 LOCAL EXCHANGE ACCESS AND ENHANCED SERVICE EXEMPTION

When access to the local exchange is required to provide a customer service (e.g., MTS-type, WATS-type, telex, Data, etc.) that uses a resold private line service, Switched Access Service Regulations, Rates and Charges, as set forth in Section 6, following, apply, except when such access to the Local Exchange is required for the provision of an enhanced service. Carrier Common Line Access rates as set forth in 3.9.1, following, apply in accordance with the rate regulations as set forth in 3.8.

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3. CARRIER COMMON LINE ACCESS SERVICE

3.1 RATE REGULATIONS

3.1.1 BILLING OF RATES

Carrier Common Line Access rates will be billed to each Switched Access Service provided under this Tariff in accordance with the regulations as set forth in 3.8.3, following, (Determination of Premium and Transitional Rates) except as set forth in 3.2.3, preceding, (WATS Access Lines), 3.6.4, preceding, (Resale) and 3.8.4, following, (PIU).

3.1.2 UNMEASURED LINESIDE ACCESS USAGE

When Carrier Common Line Access is provided in association with FGA in Company offices that are not equipped for measurement capabilities, an assumed average interstate access minutes will be used to determine Carrier Common Line Access rates. These assumed access minutes are as set forth in 6.7.7, following.

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A. CARRIER COMMON LINE ACCESS SERVICE

10 RATES AND CHARGES

	RATE PER ACCESS MINUTE
* Premium Access	
• Terminating Per Access Minute	\$0.040102 (R)
• Originating Per Access Minute	0.040102 (R)
* Transitional Access	
• Terminating Per Access Minute	0.018046 (R)
• Originating Per Access Minute	0.018046 (R)

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6. SWITCHED ACCESS SERVICE

6.1 PROVISION AND DESCRIPTION OF SWITCHED ACCESS SERVICES 6.1.1 FEATURE GROUP C (FGC) A. Description (Cont'd)

9. The Company will provide 1+ interLATA sent-paid access from pay telephones utilizing Smart Public Access Lines via FGC for calls dialed as 1+ and/or 10XXX 1+ or 101XXXX 1+ in the following manner. 1+ interLATA sent-paid access from pay telephones utilizing Basic Public Access Lines Service shall be provided by FGD. (N)

A. Smart Public Access Line (PAL)

For traffic originating from a Smart PAL, the customer to whom such calls are routed shall order FGC trunks from end offices to the customer's premises via direct trunks or via Operator Access Tandems, with the Operator Trunk-Full Feature type of transport termination, as set forth in 6.3.2, following. The trunks must be dedicated, and the customer shall specify the number of trunks required at each end office from which the customer will receive 1+ sent-paid traffic.

The customer is responsible for providing all other operator services signaling capabilities, as described in the Operator Services Systems Generic Requirements (OSSGR) Technical Reference FR-271 and the LATA Switching Systems Generic Requirements (LSSGR) Technical Reference FR-64.

When the Company provides Operator Services Signaling (OSS) between an Operator Access Tandem and the customer's premises, the customer will be required to order a separate and final trunk group from the Operator Access Tandem to the customer's premises for each Numbering Plan Area (NPA) within a LATA to identify the originating NPA. Also, the customer must order a separate trunk group for each type of coin control signaling that is utilized among the equal access end offices subtending an Operator Access Tandem.

The Company will not block 10XXX 1+ or 101XXXX 1+ calls and will route 10XXX 1+ or 101XXXX 1+ interLATA sent-paid traffic in accordance to the end user request. It will be the responsibility of the 10XXX 1+ or 101XXXX 1+ dialed carrier to complete the casual 10XXX 1+ or 101XXXX 1+ interLATA sent-paid call or to provide a recorded message to the end user.

The Company will perform normal acceptance testing for sent-paid services for Smart PALs. In addition, the Company will perform testing for coin control and Operator Trunk-Full Feature (i.e., coin collect, coin return, 1+ person-to-person, operator recall, overtime and information calls). Test tapes must be received from the customer that will be processing the 1+ interLATA sent-paid traffic 45 days prior to the routing of said 1+ traffic to that customer. The Company will provide optional testing, at the request of the customer, as set forth in Section 13, following.

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6. SWITCHED ACCESS SERVICE

6.1 PROVISION AND DESCRIPTION OF SWITCHED ACCESS SERVICES

6.1.4 FEATURE GROUP D (FGD)

A. Description (Cont'd)

11. The Company will provide 1+ interLATA sent-paid access from equal access end offices to the customer's premises for calls dialed as 1+ and/or 10XXX 1+ or 101XXXX 1+ from pay telephones utilizing PAL Service, Smart and Basic, in the following manner.

(N)

1. Smart PAL

For traffic originating from a Smart PAL, the customer to whom such calls are made shall order FGD trunks from equal access end offices to the customer's premises via direct trunks or via Operator Access Tandems, with the Operator Trunk-Full Feature type of transport termination, as set forth in 6.3.2, following. The trunks must be dedicated, and the customer shall specify the number of trunks required at each end office from which the customer will receive 1+ sent-paid traffic.

The customer is responsible for providing all other operator services signaling capabilities, as described in the Operator Services Systems Generic Requirements (OSSGR) Technical Reference FR-271 and the LATA Switching Systems Generic Requirements (LSSGR) Technical Reference FR-64.

When the Company provides Operator Services Signaling (OSS) between an Operator Access Tandem and the customer's premises, the customer will be required to order a separate and final trunk group from the Operator Access Tandem to the customer's premises for each Numbering Plan Area (NPA) within a LATA to identify the originating NPA. Also, the customer must order a separate trunk group for each type of coin control signaling that is utilized among the equal access end offices subtending an Operator Access Tandem.

The Company will not block 10XXX 1+ or 101XXXX 1+ calls and will route 10XXX 1+ or 101XXXX 1+ interLATA sent-paid traffic in accordance to the end user request. It will be the responsibility of the 10XXX 1+ or 101XXXX 1+ dialed carrier to complete the casual 10XXX 1+ or 101XXXX 1+ interLATA sent-paid call or to provide a recorded message to the end user.

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6. SWITCHED ACCESS SERVICE

6.1 PROVISION AND DESCRIPTION OF SWITCHED ACCESS SERVICES

6.1.1 FEATURE GROUP D (FGD)

A. 1+ (Cont'd)

The Company will perform normal acceptance testing for sent-paid services for Smart PALs. In addition, the Company will perform testing for coin control and Operator Trunk-Full Feature (i.e., coin collect, coin return, 1+ person-to-person, operator recall, overtime and information calls). Test tapes must be received from the customer that will be processing the 1+ interLATA sent-paid traffic 45 days prior to the routing of said 1+ traffic to that customer. The Company will provide optional testing, at the request of the customer, as set forth in Section 13, following.

(N)

B. Basic PAL

For traffic originating from a Basic PAL, the Company shall provide 1+ interLATA sent-paid access from equal access end offices to the customer's premises via FGD trunks. For traffic originating from a Basic PAL dialed as 1+ number 10XXX 1+ or 10!XXXX 1+, the customer to whom such calls are routed must order or have existing FGD trunks with ANI optional feature, as set forth in 6.3.1. following.

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6. SWITCHED ACCESS SERVICE

6.1 PROVISION AND DESCRIPTION OF SWITCHED ACCESS SERVICES 6.1.1 900 ACCESS SERVICE (Cont'd)

Calls originating in a LATA in which the customer has not ordered 900 Access Service will be blocked. Only customers who order the Expanded 900 (i.e., 0+900+NXX-XXXX) Option will be able to receive 0+900 calls to NXX codes assigned to them. In addition, calls originating in a LATA for which 900 Access Service has been established will be blocked utilizing the blocking specifications as follows:

- * 1+900+NXX-XXXX will be blocked from Smart Public Access lines, 0+, 10XXX or 101XXX, Hotel/Motel Service (except those with customer-owned rating services). (C)
- * 0+900+NXX-XXXX will be blocked from 10XXX and 101XXXX and Inmate Service.

At the option of the customer, 900 Access Service traffic may be collected at suitably equipped end offices and/or access tandems. However, the customer must collect 900 traffic at all access tandems within the LATA. Network constraints do not permit multiple tandem arrangements for routing of 900 traffic.

For 900 Access Service provisioned as Feature Group C or D, the customer may establish a separate trunk group or combine 900 traffic with other traffic types for access from suitably equipped end offices and access tandems. For 900 Access Service provisioned with traditional signaling and answer supervision, network limitations requires routing of 900 traffic from suitably equipped end offices and access tandems via a dedicated trunk group. Additionally, only 900 traffic will be routed over the dedicated trunk group.

Measurement of 900 Access Service usage shall be in accordance with the regulations set forth in 6.7.7, following for Feature Group C and D. Specifically, 900 Access Service originating usage shall be measured in the same manner as that specified for Feature Group C and D, whether provisioned separately (i.e., dedicated trunk group) or combined with other traffic types.

The Company must be notified 24 hours prior to any media stimulation. The Company maintains the right to apply protective controls, i.e., those actions such as call gapping, to ensure the provisioning of acceptable service to all telecommunications users of the Company's network services.

The nonrecurring charges for 900 Access Service are described in 6.7.1.G., following.

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6. SWITCHED ACCESS SERVICE

6.1 COMMON SWITCHING AND TRANSPORT TERMINATION OPTIONAL FEATURES

6.1.1 COMMON SWITCHING OPTIONAL FEATURES (Cont'd)

F. Automatic Number Identification (ANI)

Automatic Number Identification

This option provides the automatic transmission of a three-, seven- or ten-digit number and Information Digits to the customer's premises for calls originating in the LATA, to identify the calling station. The three-, seven- or ten-digit numbers will contain the following information: three-digit, NPA only; seven-digit, NXX-XXXX; ten-digit, NPA-NXX-XXXX. The ANI feature is an end office software function which is associated on a call-by-call basis with a trunk groups routed directly between an end office and a customer's premises via DTT or, where technically feasible, with b. TST trunk groups between an end office and an access system, and trunk groups between an access tandem and customer's premises.

The seven-digit ANI telephone number is available with Feature Group B, where provided, and Feature Group C. The seven-digit ANI telephone number is available with 900 Access Service. With these Feature Groups and 900 Access Service, ANI will be provided only with DTT. ANI will be transmitted on all calls except those originating from four- or eight-party lines, pay telephones using Feature Group B, when the end user has dialed 0- for operator assistance or when an ANI failure has occurred. (C)

The ten-digit ANI telephone number is only available with Feature Group D, including 800 DB Service and 900 Access Service provisioned as Feature Group D. The ten-digit ANI telephone number consists of the Numbering Plan Area (NPA) plus the seven-digit ANI telephone number. The ten-digit ANI telephone number will be transmitted on all calls except those identified as four- or eight-party lines or when the end user has dialed 0- for operator assistance, in which case only the NPA will be transmitted (in addition to the information digit).

When 800 DB Service is ordered, the ten-digit ANI telephone number will be transmitted on all calls except those where ANI cannot be provided as stated above or from end offices not equipped to provide ANI. In these instances, only the three-digit NPA and the information digits described in the LATA Switching Systems Generic Requirements (LSSGR), Technical Reference FR-64, if applicable, will be transmitted. (T)

With Feature Group C, ANI is provided from end offices at which Company accounting for end user billing is not provided, or where it is not required. It is not provided from end offices for which the Company needs to forward ANI to its recording equipment.

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6. SWITCHED ACCESS SERVICE

6.1 COMMON SWITCHING AND TRANSPORT TERMINATION OPTIONAL FEATURES (Cont'd)

6.1.1 TRANSPORT TERMINATION OPTIONAL FEATURES

A. Operator Trunk Coin, Non-Coin, or Combined Coin and Non-Coin

This option may be ordered to provide coin, non-coin, or combined coin and non-coin operation. It is available only with Feature Group C and D and is provided in exchanges and offices and other Company end offices where equipment is available. It is provided as a trunk type of Transport Termination. This option is not available with SS7 out of band signaling.

1. Coin

This arrangement provides initial coin return control and routing of 00+, 00-, 0+, 0-, 1+, 01+ or 011+ prefixed originating coin calls requiring operator assistance to the customer's premises. Because operator assisted coin calling traffic is routed over a trunk group dedicated to operator assisted calls, this arrangement is only provided in association with the Service Class Routing option.

The operator assistance coin calling arrangement is normally ordered by the customer in conjunction with the ANI optional feature, since the preponderance of trunk groups equipped with this arrangement will be terminated in the customer's operator service positions, rather than in the customer's manual cord boards.

2. Non-Coin

This arrangement provides the routing of 00+, 00-, 0+, 0-, 1+, 01+ or 011+ prefixed originating non-coin calls requiring operator assistance to the customer's premises. Because operator assisted non-coin calling traffic is routed over a trunk group dedicated to operator assisted calls, this arrangement is only provided in association with the Service Class Routing option.

The operator assistance non-coin calling arrangement is normally ordered by the customer in conjunction with the ANI optional feature, since the preponderance of trunk groups equipped with this arrangement will be terminated in the customer's operator service positions, rather than in the customer's manual cord boards. When so equipped, the ANI feature provides the forwarding of information digits which identify that the call has originated from a hotel or motel, and whether name number identification is required, or that special screening is required, e.g., for residential pay telephones, dormitory or inmate stations, or other screening arrangements agreed to between the customer and the Company.

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6. SWITCHED ACCESS SERVICE

6.1 COMMON SWITCHING AND TRANSPORT TERMINATION OPTIONAL FEATURES

6.1.1 TRANSPORT TERMINATION OPTIONAL FEATURES

A. Operator Trunk Coin, Non-Coin, or Combined Coin and Non-Coin (Cont'd)

1. Combined Coin and Non-Coin

This arrangement provides initial coin return control and routing of 00+, 00-, 0+, 0-, 1+, 01+ or 011+ prefixed originating operator assisted coin and non-coin calls requiring operator assistance to the customer's premises. Because operator assisted coin and non-coin calling traffic is routed over a trunk group dedicated to operator assisted calls, this arrangement is only provided in association with the Service Class Routing option.

This arrangement is normally ordered by the customer in conjunction with the ANI optional feature, since the preponderance of trunk groups equipped with this arrangement will be terminated in the customer's operator services systems, rather than in the customer's manual cord boards. When so equipped, the ANI optional feature provides the forwarding of information digits which identify that the call has originated from a hotel or motel, and whether room number identification is required, or that special screening is required, e.g., for coinless pay telephones, directory or innuote stations, or other screening arrangements agreed to between the customer and the Company.

(C)

B. Operator Trunk - Full Feature

This option provides the operator functions available in the end office to the customer's operator. These functions are (1), Operator Released; (2), Operator Answered; (3), Coin Collect; (4), Coin Return and (5), Ringback. It is available with Feature Group D and is provided as a trunk type of Transport Termination. This option is not available with SS7 out of band signaling.

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13. ADDITIONAL ENGINEERING, ADDITIONAL LABOR AND MISCELLANEOUS SERVICES

13.1 MISCELLANEOUS SERVICES (Cont'd)

13.1.1 RESTORATION PRIORITY

Existing Restoration Priority (RP) was superceded by Telecommunications Service Priority (TSP), as specified in Section 13.3.7, following, on September 10, 1990. Existing RP arrangements remain in effect for thirty (30) months until March 10, 1993. If RP Service is converted to TSP, the customer will incur the Priority Restoration Level Implementation Nonrecurring Charge as specified in 13.4.3.D., following.

13.1.2 PRESUBSCRIPTION

A. General Description

Presubscription is an procedure whereby a customer or a PSP may select and designate to the Company an IC to access, without dialing an access code, for local LATA calls. This IC is referred to as the end user's or PSP's primary IC.

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The presubscription procedure applies to Telephone Exchange Service lines and/or remote, Feature Group A lines, Centrex lines, and Public Access Line Service.

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Should a caller wish to use the services of an IC other than the primary IC (PIC), it is necessary for the caller to dial the necessary access code(s) to reach that IC's service(s).

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B. Terms and Conditions, Rates and Charges

Terms and conditions, Rates and Charges for Presubscription are the same as those set forth in Section 13. of U S WEST Communications Tariff F.C.C. No. 5.

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20. COMMON CHANNEL SIGNALING NETWORK (CCSN)

20.1 SERVICE DESCRIPTION (Cont'd)

20.1.1 LINE INFORMATION DATA BASE (LIDB)

LIDB is provided by the Company to its customers in support of alternate billing services which offer LIDB customers the choice to permit their end user to bill calls to an account other than the account associated with the originating calling number. All LIDB queries are transported uniformly to the Company's LIDB where the following functions are performed:

- * Validation of the 14 digit telecommunications calling card account number stored in LIDB.
- * Determination of whether the billed line has decided in advance to reject certain calls billed as collect and/or to a third number.
- * Determination of the billed line as a pay telephone or a nonworking telephone number.
- * Determination of central office codes as active or vacant.

A customer LIDB query is transported from the customer's Operator Service System (OSS) identified by the Service Switching Point (SSP) Originating Point Code (OPC) to the Regional STP pair as designated by the Company. The customer's OPC is translated in the STP. The STP translation process validates the OPC and routes the query to and from the Service Control Point (SCP) which stores all LIDB information and performs the validation function. OPC data is recorded in the SCP and later used by the Company to bill the customer a LIDB Access Query and Validation Query as set forth in 20.3.2, following.

Technical Specifications for LIDB Service are described in Technical Reference TR-TSV-000954, TR-NWT-001158 and in U S WEST Communications Technical Publication PUB 77342.

LIDB is accessed via the Company's CCSN. LIDB customers must order CCSAC Service as set forth in this section.

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20. COMMON CHANNEL SIGNALING NETWORK (CCSN)

20.1. CHARGES, SERVICE PROVISIONING AND PERFORMANCE REQUIREMENTS 20.1.1. SERVICE PROVISIONING

20.1.1.1. LIDB Service Provisioning (Cont'd)

The Company's LIDB contains a record for all working line numbers, active U S WEST Communications calling card data, line numbers which contain billed number scanning restrictions, pay telephone line numbers and vacant and active billed Number Groups. These records are updated on a routine basis and an immediate basis as described following:

1. Routine Updates

The Company will update LIDB on a daily basis for service order processing changes (e.g., new service, disconnects, moves, modifications, cancellations and assignment of an account).

2. Immediate Updates

The Company has procedures to update LIDB as requested by customers. These updates are processed the same day as requested by customers.

The Company has procedures to deactivate (i.e., automatically and manually) a U S WEST Communications calling card number when call attempt activity exceeds the Company's designated usage threshold level over a given period of time. All U S WEST Communications calling card call attempts are monitored against the Company's designated usage thresholds. These thresholds are based upon charges of service and generate warning messages to identify potential calling card fraudulent activity.

The Company will monitor and deactivate U S WEST Communications calling card numbers seven (7) days a week, twenty-four (24) hours a day. U S WEST Communications calling cards determined by the Company as being fraudulently used and/or reported to the Company as lost or stolen will be deactivated within one hour from the time the fraud was determined and/or reported.

The Company will provide to LIDB customers, upon request, the Billing Name and Address (BNA) information related to a U S WEST Communications calling card when LIDB call attempt activity for a specific account exceeds the Company's designated fraud control threshold level. BNA information provided to a LIDB customer is to be used exclusively for resolving the fraud investigation case and for notifying the calling party for telecommunications services and collecting the amount due.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT)	ORDER FOR AND NOTICE
OF SWITCHED ACCESS RATES FOR U S)	OF PREHEARING
WEST COMMUNICATIONS, INC.)	CONFERENCE ON
)	CONTINUATION OF
)	HEARING
	TC96-107

A hearing was held in this docket on October 9 and 10, 1996, before the Public Utilities Commission (Commission). At a regularly scheduled meeting of the Commission on December 9, 1996, the Commission moved to reopen the record for the taking of more evidence. On January 27, 1997, the Commission granted a Motion from AT&T Communications of the Midwest, Inc. (AT&T) to disapprove the rate increase and close this docket. This matter was appealed to the Circuit Court, Sixth Judicial Circuit, which reversed and remanded the matter to the Commission. The Commission, acting under Court direction to handle this matter forthwith, hereby

ORDERS that a Prehearing Conference in the above referenced docket shall be held on July 7, 1997, at 8:15 a.m. in Room 412 of the Capitol Building, Pierre, South Dakota.

Parties participating in the prehearing conference should anticipate that the Commission may enter an oral procedural order and parties should also anticipate that they will be expected to give firm commitments to the Commission as to the time necessary for them to prepare for the reopened hearing and list the number of witnesses they expect to call. **PARTIES SHOULD ALSO BEAR IN MIND THAT THE CIRCUIT COURT HAS REMANDED THE COMMISSION TO HANDLE THIS MATTER FORTHWITH.** In order to expedite the matter, the Commission will consider whether to include the following as part of its prehearing order:

- 1. **empowering staff to conduct an on site review of U S WEST** consisting of sampling of all cost study inputs in order to address deficiencies which the Commission found as part of its motion to reopen this record on December 9, 1996;
- 2. **give U S WEST the opportunity to present additional evidence to address deficiencies which the Commission found as part of its motion to reopen this record on December 9, 1996;**
- 3. **give intervenors the opportunity to present additional evidence to address deficiencies which the Commission found as part of its motion to reopen this record on December 9, 1996; and**
- 4. **other procedural rulings and guidelines.**

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-532-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 23 day of June, 1997.

<p align="center">CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by hand-delivery or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p><u>Alene Kalbo</u></p> <p><u>6/23/97</u></p> <p align="center"><small>(OFFICIAL SEAL)</small></p>
--

BY ORDER OF THE COMMISSION:
Commissioners Burg, Nelson and
Schoenfelder

William T. Bullard, Jr.
WILLIAM BULLARD, JR.
Executive Director

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ESTABLISHMENT OF SWITCHED ACCESS RATES FOR U S WEST COMMUNICATIONS, INC.)))	PREHEARING ORDER ON REOPENING RECORD TC96-107
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The Circuit Court, the Honorable Steven L. Zinter presiding, reversed and remanded this matter to the Public Utilities Commission (Commission) on May 29, 1997, in accordance with the Court's oral bench decision; the Commission received a transcript of that oral bench decision on June 2, 1997, and the Notice of Entry of Order of Remand dated May 31, 1997, was received by the Commission on June 9, 1997. The Court has reversed the Commission's granting of the motion of AT&T Communications of the Midwest, Inc. (AT&T) to dismiss the action. The Court, upon remanding this matter, has stated that it is restored to a status of being an open docket; the adopted December 9, 1996 Motion of the Commission to reopen the record and take additional evidence on the five factors enumerated in the Motion is yet to be addressed. It will be noted for the record that Commissioner Pam Nelson will be participating in this docket on remand. The Commission having considered the directions of the Court hereby enters the following Prehearing Order.

1. The Commission rejects the analyses of staff witnesses Rislov, Best and Knadle which was presented at the hearing in this matter on October 9 and 10, 1996, and in their prefiled testimony. These analyses are rejected because the responses to data requests upon which the analyses were based were not obtained under oath. Further, all figures supplied to staff by U S WEST Communications, Inc. (U S WEST) or which were used as inputs into U S WEST's cost study were not independently verified by staff as to their accuracy or validity for use as inputs to the cost study. As such these witnesses' analyses, upon reopening the record, shall be given no evidentiary weight. Staff shall submit a new analysis of this case, subject to the directives of this Order.

2. In light of the foregoing deficiencies in staff's analyses, the Commission is Ordering staff to conduct an on-site investigation which shall consist of a review in this docket to verify numbers used by U S WEST as inputs to its cost study and to determine the accuracy of those numbers used by U S WEST and the validity of their use in the cost study and to prepare a report to be filed with staff's prefiled testimony with this Commission for consideration at the reopened hearing in this matter. Staff shall, at a minimum, provide the following information to the Commission as a result of this investigation:

a. a review of inputs which staff deems significant and which are required by Commission rules for cost studies, which were used by U S WEST in its cost study. The purpose of such review shall be to determine the accuracy of the inputs for use under the Commission's rules on cost studies; and

b. provide evidence that this review consists of no less than reviewing a sampling of U S WEST's records which would be compiled by U S WEST in the formulation of its inputs to its cost study; and

c. an analysis of differences, if any, which may be found in the data used by U S WEST in the formulation of its inputs actually used and what staff deems appropriate under the Commission's rules for cost studies; and

d. reviews performed on U S WEST's inputs shall not be exclusively based upon secondary sources such as ARMIS reports; and

e. all responses to staff's data requests shall be under oath and filed with the Commission for inclusion in the docket; and

f. an analysis of how consumers' interests are affected by any proposed switched access increase.

At the Prehearing Conference, staff has requested the assistance of accountants or other consultants in performing this work. The Commission acknowledges this request and will consider approving contracts for such assistance. Staff shall present such subjects to the Commission for consideration at a public meeting of the Commission, the scheduling of which shall be done through the Executive Director for the Commission.

Parties have requested the right to participate in any on-site reviews performed by or on behalf of Commission Staff. The Commission does not have a position on this request and this is not to be construed as an order or ruling by the Commission as such activity may involve confidentiality claims upon which the Commission may later be called upon to rule. The parties may wish to coordinate their efforts with Commission Staff and U S WEST.

3. The Commission gives U S WEST the opportunity to present additional evidence with regard to the cost study at the reopened hearing in this matter. Any additional financial evidence submitted by U S WEST shall, at a minimum, include foundational evidence from its employees or consultants who actually compile or otherwise assemble the information contained in the cost study as opposed to those employees who act only in a supervisory capacity. All such evidence shall further be verified by U S WEST as to its accuracy and validity for use in the cost study.

4. Intervenor, consistent with the Commission's adopted Motion of December 9, 1999, shall be given the opportunity to present additional evidence relative to two aspects of this docket: (1) the cost study filed by U S WEST including the application of prescribed depreciation in it and any audits or reviews done by intervenors; and (2) the public interest as it is affected by the access charge proposed by U S WEST including such aspects as quantification of the effect of the access charge and the effect of rate shock.

5. In conducting the hearing in this reopened record, the Commission will sparingly permit the use of late filed exhibits under its rule ARSD 20:10:01:24.03. Parties are expected to come to the hearing prepared to present their case. The Commission will consider excluding from admission evidence which is irrelevant, incompetent, immaterial or unduly repetitious.

6 The schedule for deadlines in this matter shall be as follows:

Simultaneous Prefiled testimony: August 27, 1997

Simultaneous Prefiled Rebuttal testimony: September 3, 1997

Hearing: September 10 through 12, 1997, Room 412, State Capitol Building, Pierre, South Dakota, commencing at 9:00 a.m., on September 10, 1997.

Parties wishing to file any Motions for the hearing shall do so at least five days prior to the hearing. Motions and supporting authority, combined, shall not exceed ten pages in length.

Because of the Court's directive that this matter be handled forthwith, parties are encouraged to file prehearing briefs instead of post hearing briefs to assist the Commission in ruling in a timely manner.

Pierre, South Dakota, this 3rd day of July, 1997.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket sheet, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
<u>Muriel Kelso</u>	
<u>7/3/97</u>	
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED

JUL 06 1997

IN THE MATTER OF THE ESTABLISHMENT
OF SWITCHED ACCESS RATES FOR
U S WEST COMMUNICATIONS, INC.

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

TC96-107

HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS:

July 2, 1997
8:15 A.M.
Capitol Building
Pierre, South Dakota

PUC COMMISSION:

Jim Burg, Chairman
Laska Schoenfelder, Commissioner
Pam Nelson, Commissioner

COMMISSION STAFF
PRESENT:

Karen Cremer
Camron Hoseck

Reported by: Lori J. Grode, RMR

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For U S West:

William P. Heaston
and
Michael McKnight
1801 California Street, Suite 5100
Denver, Colorado, 80202

For AT&T:

Glenn Solomon
555 W. 5th Street, 40th Floor
Los Angeles, CA 90013

For Sprint:

Richard P. Tieszen
P.O. Box 626
Pierre, South Dakota, 57501

For MCI:

Bob Sahr
P.O. Box 160
Pierre, South Dakota, 57501

For TAG:

Bob Riter
and
David A. Pfeifle
P.O. Box 280
Pierre, South Dakota, 57501

For DCT:

Robert Marmet
P.O. Box 269
Centerville, SD 57014

P R O C E E D I N G S

CHAIRMAN BURG: It's 8:15 as scheduled in the morning. Now is the time and the place for a prehearing conference in Docket TC96-107, entitled in The Matter of The Establishment of Switched Access Rates for U S West Communications, Incorporated.

This matter is presently before the Commission on remand from the Sixth Circuit Court, which has given certain instructions and rulings for the Commission to follow. Essentially, we're back to where we were prior to AT&T's Motion to Dismiss where the Commission on December 9, 1996, voted to re-open the record for the purpose of taking additional evidence in specific areas.

It should be kept in mind that the Circuit Court has directed this Commission to handle the matter forthwith. We will keep this matter moving in an expedited manner.

I will take a phone call on the phone right now. Bev Cederburg, are you on?

Glenn Solomon?

MR. SOLOMON: Yes, Commissioner. Good morning.

CHAIRMAN BURG: Good morning. Loren Hiatt?

MR. HIATT: Yes, Jim, I'm here. Thank you.

CHAIRMAN BURG: Jon Lehner?

MR. LEHNER: Here, Commissioner.

CHAIRMAN BURG: Bill Heaston?

MR. HEASTON: I'm here, Commissioner.

CHAIRMAN BURG: Wayne Culp? Wayne Culp, are

you on yet?

MR. CULP: Yes, Chairman, I'm here.

CHAIRMAN BURG: Thank you. Mike McKnight?

MR. MCKNIGHT: Yes, Commissioner, I'm here.

CHAIRMAN BURG: And Bev Cederburg, are you on

yet? Could somebody else come on? Okay. Appearances

of the parties, whether by phone or present, I'll take

appearances at this time. Who appears for staff?

MS. CREMER: Karen Cremer for staff.

CHAIRMAN BURG: AT&T?

MR. SOLOMON: Yes, Glenn Solomon for AT&T.

CHAIRMAN BURG: Sprint?

MR. TIESZEN: Dick Tieszen.

CHAIRMAN BURG: MCI?

MR. SAHR: Bob Sahr.

CHAIRMAN BURG: The TAG group?

MR. RITER: Bob Riter and David Pfeifle.

CHAIRMAN BURG: And U S West.

MR. HEASTON: Bill Heaston and Mike

McKnight.

CHAIRMAN BURG: And DCT?

MR. MARMET: Robert Marmet, Mr. Chairman.

CHAIRMAN BURG: Is there anybody else?

For the record, it should be noted that Commissioner Nelson will be joining the Commission on this case. She has read the record and is prepared to participate in the case.

COMMISSIONER SCHOENFELDER: Mr. Chairman, I have a motion. In light of the Circuit Court decision in this matter, and in order to give the parties in these proceedings some guidance and structure for the reopening of the record in this case, I'm making the following motions:

That the Commission reject the analysis of staff witnesses in Rislov, Best, and Knadle, which was presented at the hearing on this matter on October 9th and 10th, 1996, and in the prefiled testimony submitted for that hearing.

These analyses were rejected because of responses to the data request upon which the analyses were based were not obtained under oath. They are further rejected because figures supplied to the staff by U S West Communications, Incorporated, which were used as inputs in U S West's cost studies were not independently verified by staff as to their accuracy or

1 validity for use as inputs in the cost study.

2 As such, these witnesses' analyses upon
3 reopening the record shall be given no evidentiary
4 weight.

5 CHAIRMAN BURG: Is there a second?

6 COMMISSIONER NELSON: Second.

7 CHAIRMAN BURG: And I'll concur.

8 At this time I will turn the Commission --
9 I'll turn the meeting over to Commission Counsel to
10 conduct the prehearing conference to fulfill the
11 remanded requirements of the Circuit Court.

12 MR. HOSECK: Mr. Chairman, Members of the
13 Commission and Counsel:

14 The first thing that we're going to look at
15 is some of the scheduling. And basically that is one
16 of the main things that we expect to accomplish here
17 today is the scheduling and get a rough idea of the
18 number of witnesses that the parties wish to call.

19 And in doing this, it is anticipated that the
20 Commission will issue a Pretrial Order. And so what
21 we're looking for is some input from the participants
22 at this point in time.

23 If the Commission proceeds with its pretrial
24 or Prehearing Order, and orders staff to conduct an
25 on-site investigation in this docket to verify numbers

1 used by U S West as inputs for its cost study and
2 determine the accuracy of those numbers and validity of
3 their use in the cost study, and that such an Order
4 would include the preparation of a report to be filed
5 with the Commission, either independently or with
6 prefiled testimony.

7 The ultimate question that we would have at
8 least for staff in this regard is the amount of time
9 that it would take and the number of witnesses that
10 would be called.

11 Here are some of the items that the
12 Commission is considering putting in its order. That
13 there would be a review of all the inputs required by
14 the rules for the cost study which was used by U S West
15 in the cost study in this case.

16 The purpose of this review would be to
17 determine the accuracy of the input. This would -- as
18 a part of this Order the Commission would consider that
19 this review be done by a sampling of U S West's
20 records; that there would be an analysis of
21 differences, if any, which might be found in U S West's
22 inputs and what staff deems appropriate; that staff
23 would not be allowed to base its review upon secondary
24 sources such as the ARMIS report; and all data requests
25 which staff may require would be responded to under

6
each; and, finally, that staff's work would include an analysis of the consumer interests.

Realizing that this is a comprehensive statement of what the Commission is considering ordering staff to do, Karen, do you have an estimate of the amount of time that it might take to accomplish that?

MS. CREMER: Well, first of all, is there going to be a transcript of this so we have an idea?

MR. HOSECK: There will be a final Order that will incorporate the Commission's final directive on this. Yeah, it will be in writing, yeah.

MS. CREMER: Well, I think there's 592 inputs on the cost study. Now, there's also minutes of use which has the biggest impact of all; and I don't know if you want minutes of use verified also.

MR. HOSECK: I would believe that anything that would go into the ultimate calculation would be something that the Commission would want some verification of.

MS. CREMER: Well, we're talking, I have no idea, hundreds of millions of minutes, which would require, I assume, then, a computer specialist to be hired to verify that U S West's computer programs are accurate.

MR. HOSECK: Well, I would also emphasize that what the Commission is considering at this point in time is that it would be done by a sampling.

MS. CREMER: Well, minutes of use can't be done by a sampling.

MR. HOSECK: Okay.

MS. CREMER: 592 inputs, which is at a minimum, I mean you're just talking a minimum of 592 inputs. There's inputs that go into those 592. What do you consider a sampling?

MR. HOSECK: That would be left to the discretion of the Commission -- excuse me, to the staff. I think that that would be a fair --

MS. CREMER: Well, then, we have another consideration here and that is that as we all know the Commission doesn't have a PCA on staff, and nor are the analysts trained in what are generally-accepted accounting principles or standards. So if -- the staff is more prepared to go on site and pull numbers and do a sampling; however, what I would like to point out now is if any party or the Commission anticipates objecting to the staff's lack of an educational background in this matter, we would like to know that now. And then we would like to have the Commission to grant approval to hire a CPA firm with someone knowledgeable in

knowledge such as this, if that's the term we're using here is audit, who would supervise staff so that the appropriate tasks and measures are done, because we don't know what they are.

MR. HOSECK: Okay. In light of that, do you have a rough estimate of the time that you think this might be able to be accomplished?

MS. CREMER: Until we have approval for a computer specialist to verify minutes of use, and then approval if they want of someone to supervise staff, I have no idea how long that will take, or how long it would even take to find someone who's qualified to do that. to see what their schedule is so that they can go with staff and supervise them, or at least consult. Consult probably wouldn't be appropriate word -- to supervise them. I don't know. You know, 592 inputs is a lot of numbers. And if you're sampling at a 95 percent accuracy -- I believe the Commission said before 98 percent is what they want verified, you're talking a lot of time.

MR. HOSECK: And do you have any idea of the number of witnesses that might be called?

MS. CREMER: Well, depending on what this consultant -- not consultant, what this CPA firm is going to -- I would assume it would be at least Harlan,

1 and Greg and possibly Tammy may get pulled into
2 And when is Charlie sitting in on this matter?
3 Was he with the Commission? Maybe someone from the
4 team we hire.

5 MR. HOSECK: Okay. As to U S West in this
6 matter, it is the -- it is at this point in time that
7 the Commission is at least considering giving U S West
8 the opportunity to present additional evidence
9 regarding its cost study in this docket. The
10 Commission will expect appropriate foundation evidence
11 for the figures used in putting a verification as to
12 accuracy and validity of their use in the cost study.

13 Counsel for U S West, do you have any
14 estimate for the Commission as to the amount of time
15 that might be necessary to accomplish this?

16 MR. HEASTON: Well, this is Bill Heaston. In
17 the first instance, I want to object to what just
18 happened with the motion and the decision to set the
19 entire case. That is not what Judge Zinter ordered by
20 the face of Judge Zinter's Order. Without a hearing,
21 it wasn't noticed that this sort of decision was going
22 to be made by the Commission this morning to conduct
23 the entire case, the factual basis of the case. I
24 don't see how they can do it. So I want that reflected
25 in the Order if there is not going to be a transcript

of this, that this is what the Commission did. I would really like to find some way to appeal that before we go any further because I don't think it's appropriate.

The second thing is we believe Judge Zinter's Order made it very clear that we have no further burden here, that we don't intend to introduce any additional evidence. The cost studies are in front of the Commission. That if they want to audit those or have staff audit those, we're more than willing to cooperate fully to provide whatever facilities are necessary to facilitate that, to get it done quickly and fairly, and so that the staff can provide a report to the Commission as to the results of any audit.

It would be our recommendation that once the staff completes this audit, taking whatever time is reasonably necessary to do it -- and I understand Miss Gremer's concerns -- that then the parties have an opportunity to comment on that. I don't think, on behalf of U S West, I have any clue as to what witnesses would be necessary because it would depend on the results of the audit. As I believe it, though, the audit will demonstrate no significant deviation from the model or the rules or end up the numbers are solid. I would not anticipate that I would have to produce any more evidence or any testimony by any

witnesses. Observing Mr. Culp and those who assist Mr. Culp are available for the audit and, if necessary, and I don't know other than Mr. Culp, I don't know who else would be necessary. We would provide witnesses if necessary to comment on the results of the audit. That's all I have.

MR. HOSECK: Okay. Thank you. As to the intervenors, intervenors will also be given an opportunity to present additional evidence in this case relative to two aspects of this docket. This is consistent with the December 9 Motion of the Commission. Those two aspects -- and I'm paraphrasing this -- are as to the cost study itself filed by U S West, including the application of represetcribed depreciation in it and any audit reviews that may be done by intervenors.

Secondly, again, in a general sense, the public interest as it is affected by the access charge proposed by U S West, including qualification of the effect of the access charge increase and the effect of any rate shock.

Also, I would be interested in seeing if the intervenors anticipate any particular discovery problems, it would be a consideration of this Commission to give the intervenors adequate time to do

whatever is necessary for the preparation of their case.

And in light of that, counsel for AT&T, could you give the Commission an estimate of what your timing requirements might be and the number of witnesses that you might anticipate calling in this matter?

MR. SOLOMON: Yes. This is Glenn Solomon. And I believe I'm going to have to explain our comment on this. But at this time AT&T's position is that AT&T wouldn't be calling further witnesses in the sense that the focus of these proceedings remains on the existing cost model. We believe that the cost model has been superseded outdated both by time, by Judge Zinter's Order, and by the FCC rules on access reform.

We believe that Judge Zinter's Order really shifts the focus back to the statutory requirements that the Commission come up with a fair and reasonable switched access rate. And that that doesn't allow the Commission to just use the cost model, particularly if the cost model no longer complies with that statutory requirement, it would be fair and reasonable switched access rate. We believe that the law doesn't require the Commission to follow its existing cost model under such circumstances. And, in fact, Judge Zinter's Order focus puts it back to fair and reasonable to the extent

1 that the cost model doesn't come up with a fair and
2 reasonable rate, the Commission is not able to use the
3 existing cost model.

4 We also believe that the record really does
5 not need any supplementing to come up with such a
6 model. The record contains evidence already that the
7 switched access rate shouldn't increase, it should
8 actually decrease. There is a litany of evidence and
9 I'm not going to go through it all. But I think it's
10 important to point out that the range somehow has been
11 shifted to a discussion of whether we even have an
12 increase or don't have an increase without looking at
13 evidence that a fair and reasonable rate should either
14 mirror the switched access rates or go through economic
15 costs in accordance with the FCC's rules, in accordance
16 with the Act.

17 There's evidence that the true economic cost
18 here is less than a cent, .5 cents as the transcript
19 states 304. There's evidence that this TOLC portion
20 that U S West has proposed, the four cents they've
21 proposed, actually is at a true economic cost of zero.
22 There's a long-standing admission from an earlier
23 docket from 91-040A that interstate and intrastate
24 switched access rates are in fact economically the same
25 and that therefore there should be a mirroring --

1 MR. HOSECK: Mr. Solomon, I think you're
2 getting into the merits of the case. At this point in
3 time all I think the Commission is interested in is the
4 procedural aspect of this. And I think we understand
5 generally what your position may be. However, at this
6 point in time we're just looking at the procedural
7 matters, the time that you need to do any preparation,
8 if you intend to participate in the hearing, and that's
9 really all we're looking for at this point in time.

10 MR. SOLOMON: I understand. And I will
11 abbreviate what I'm saying, but --

12 MR. HOSECK: Well, Mr. Solomon, I don't know
13 that we're necessarily interested in hearing any more
14 on this, basically if you could just respond to the
15 timing aspects of this, that's all I would be looking
16 for. Thank you.

17 MR. SOLOMON: In the sense the cost model is
18 the focus of this, we don't anticipate putting forward
19 further witnesses. If the focus shifts to access
20 reform, we're fully prepared to participate in that,
21 and I anticipate there would be a number of witnesses
22 if it were an access reform focus of the case.

23 I will say that we may have a witness who
24 would look at what would come out of any audit, or any
25 new materials provided by U S West. But that would be

1 AT&T's position. The reason I assessed the other reason
2 was not to get into the facts, but to talk really about
3 maybe item number four on the Order and Notice from
4 this morning's conference, which was procedural matters
5 and guidelines. AT&T's position is that we don't need
6 to re-open and go through a full audit in this docket
7 in order to follow Judge Zinter's Order and assess a
8 fair and reasonable rate to have that set and completed
9 forthwith.

10 MR. HOSECK: Okay. And in terms of any time
11 that you would need before a hearing, do you have
12 anything that you wish to tell the Commission in that
13 regard?

14 MR. SOLOMON: I guess I would have to say
15 until we've seen what the staff's audit looked like, it
16 would be hard to give an exact estimate. If a large
17 volume comes out of that, that could take a substantial
18 amount of time to look at. To give you an exact
19 period, I need to know what I'm going to be looking
20 at. U S West says that they don't expect to put
21 anything else forward, which I guess is more than
22 anticipated. If they do, in fact, put something
23 forward, that would also save time. But I hope you
24 understand that it's hard to estimate an exact amount
25 of time to review material that we haven't seen yet.

1 because we don't know the volume.

2 MR. HOSECK: Okay. Thank you. Sprint, could
3 you give us an idea of the level of participation that
4 you wish to have in this matter in terms of the time
5 necessary and the number of witnesses?

6 MR. TIESZEN: Well, first of all, my name is
7 Dick Tieszen on behalf of Sprint. I concur it's pretty
8 hard for me to give you any real estimates of time when
9 we don't know what we need to review before a hearing.
10 I would indicate that Sprint does intend to
11 participate. At this point in time we do not intend to
12 call any witnesses or to offer any additional
13 testimony. However, we would reserve the right to
14 offer comment and possibly testimony in response to
15 what investigative results may come out of staff's
16 work. Just as staff tells you they don't know how many
17 witnesses they're going to need or how long they need
18 to do it, it's a little difficult for me to offer you
19 much more than that in terms of what time we would need
20 in order to respond to what they may come up with. But
21 at this point in time, we don't perceive that we will
22 have any need to put in additional evidence.

23 We don't disagree with the comments, I believe,
24 for the most part that were made by AT&T, in that we
25 think that the record was sufficient and is sufficient

1 and that it may not require to be completely opened
2 such as we're seeking to do here at this point in
3 time.

4 We do intend to participate, and we will want
5 to reserve the right to offer evidence in response to
6 what staff may come up with since that's an unknown
7 factor.

8 You asked a question, I think, generic
9 because I know you're looking for time and you want to
10 try and set some schedule. I don't know what may be
11 appropriate, but it would seem to me that all of the
12 parties are going to need two or three weeks subsequent
13 to the time that staff comes up with the conclusion of
14 their work for the parties to look at that and
15 determine what might be an appropriate response by way
16 of testimony.

17 MR. HOSECK: Thank you. MCI, can you give
18 the Commission an idea of the amount of time and the
19 number of witnesses?

20 MR. SAHR: Good morning to the Commission and
21 staff. My name is Bob Sahr, and I'm appearing on
22 behalf of MCI.

23 MCI would echo the comments of Sprint and
24 AT&T in that until the actual audit would occur and
25 would see what the results of that audit would be, I

1 would be premature to give a time frame on how long it
2 would take to respond to those -- to that audit.

3 I would say that the time frame that
4 Mr. Tieszen discussed probably would be appropriate.
5 We would at least need a few weeks to be able to look
6 at the results of the audit and to respond
7 appropriately. And at this point MCI has no plans to
8 call further witnesses and would also -- and as has
9 been pointed out to the Commission -- point out that
10 Judge Zinter's Order of Remand, we feel, should be
11 given a more narrow focus. The Judge clearly left it
12 open to the Commission to simply indicate the findings
13 on which the Commission would make -- would allow no
14 increase in switched access rates. And I believe that
15 could be -- take place without the audit and without
16 additional testimony.

17 MR. HOSECK: Okay. Thank you. TAG group.

18 MR. RITER: Good morning, Commissioners,
19 others in attendance. Bob Riter, I'm a lawyer from
20 Pierre, and along with David Pfeifle, represent the
21 Telecommunications Action Group.

22 We do expect to have some witnesses testify
23 at this next hearing. And part of the quandary we're
24 in, and I suspect you are as well, none of us want to
25 delay the resolution of this any longer than absolutely

21
1 necessary because the concern relative to what's
2 happening out there right now. So we are anxious to
3 get this matter resolved. We're anxious to have the
4 next hearing. By the same token, and I know you are
5 but by the same token, staff has to work apparently
6 ahead of them relative to this matter.

7 We're willing to put this on an expedited
8 schedule and do whatever we can do to get it before you
9 as soon as possible. We would like -- and I don't know
10 necessarily how you're going to anticipate doing this,
11 but relative to the on-site review, if it's possible
12 for someone from our group, or a representative, or
13 someone that we might retain to participate in that
14 oversight, on that on-site review, we'd like to have
15 that opportunity. If not, and we certainly, as the
16 other individuals have mentioned, would like the
17 opportunity then thereafter to review the documents.

18 We would anticipate we would call maybe three
19 or four witnesses. We anticipate that at least one of
20 them would be a certified public accountant. Another
21 one might be an expert in this general area relative to
22 issues involved with -- well, one of the things you
23 brought up earlier was the public interest and the
24 effect of the increase and the rate shock, not only
25 amongst the consumers in South Dakota, but also the

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1 parties, including our clients who are involved in the
2 providing of services in this state, primarily in this
3 state, and the effect that might have on the
4 competition, which then accordingly affects the public
5 interest.

6 So we -- I'm not telling you necessarily how
7 long. Our witnesses, I suspect, could take a half a
8 day maybe with the cross-examination. I would think
9 that would be possible. We'd like the opportunity to
10 look over the information on the audit and the
11 depreciation. And I'm sure this is one of those things
12 that if we sat back and had a lot of time, we'd spend
13 months and months, but we don't think we have time to
14 do that, and I don't think you feel that way either.
15 So we would like to get right to it and the sooner we
16 can get a hearing scheduled before you, the better for
17 us. I don't know if I'm responding necessarily.

18 MR. HOSECK: You feel that you have certain
19 needs in terms of time, in terms of preparation, and
20 might there be any strategy or tasks that you want
21 accomplished and anything of that nature.

22 MR. RITER: I think from our standpoint the
23 information that we would put together from our own
24 internal records -- and we could surely do that and
25 have that done before the end of this month. The hole,

1 so to speak, is what about the audit performed on site
2 and what information that comes out of that, how long
3 will it take. And I appreciate what the Commission has
4 said in that is they want a sampling, so we don't
5 anticipate this to be a forever kind of situation, but
6 nonetheless it will take a little bit of time. And I
7 think our -- we have talked with an individual from our
8 of state and asked him to give us some guidance, and he
9 would like the opportunity to review that information.
10 But he can put it on an expedited thing. And I think
11 Mr. Tieszen was talking about a couple weeks
12 afterwards, and certainly we would work within those
13 confines as well. I know Mr. Solomon talked about the
14 cost model itself, and I thought although I know the
15 Commission is not interested in that right at this
16 moment, I thought some of the comments he made were
17 good and would probably be ones that we might well
18 echo. So is that helpful?

19 MR. HOSECK: Thank you. Dakota, DCT.

20 MR. MARMET: Thank you. Robert Marmet for
21 Dakota Cooperative. I can't honestly give you any kind
22 of indication as to what sort of time frame we would
23 require to respond to the cost study or to staff's
24 analysis of that.

25 I sympathize with Miss Cremer and staff and

1 the daunting task that they face as the initial
2 investigators of those numbers. For those of us that
3 would be reviewing their input, any estimate as to how
4 time that would be required to do that, in the absence
5 of seeing what they're looking at and what they
6 produce, is really beyond what I can give you this
7 morning.

8 I can tell you that as to the public interest
9 and the rate shock, Dakota could take care of its
10 portion of the case with two or, at most, three
11 witnesses in half a day. That would allow time for
12 their direct testimony and any cross-examination by
13 other intervenors, or by U S West, or staff
14 Commission.

15 I could tell you that it would take a minimum
16 of two weeks after receiving the information from the
17 audit to give it any kind of reasonable and adequate
18 review. So I would reserve the right to call any
19 witnesses based on what we find from those findings,
20 but otherwise half a day is all that we would need.

21 MR. HOSECK: Thank you. Just as a matter of
22 preliminary statement so that the counsel who are going
23 to be approaching this case on the reopening of the
24 matter, I think that the Commission will be giving
25 serious consideration to using a spared use of

1 late-filed exhibits, even though they're allowed under
2 the Administrative Rules, they seem to be a
3 discretionary thing. And, basically, the Commission
4 will expect the parties to come to the hearing prepared
5 to try it with very limited use of late-filed
6 exhibits.

7 And the Commission is probably going to
8 consider a little bit more of a structured hearing in
9 the setting the second time around. And we'll be
10 looking at the Rules of Evidence as the APA mandates.
11 And so that's kind of an indication of the direction
12 that the Commission is considering going in this
13 matter.

14 As to the scheduling, what I think we will do
15 is go back and take everybody's comments into
16 consideration, and then hopefully in a couple of days
17 have a written Prehearing Order out for all the parties
18 that will specify exactly what the Commission expects
19 of staff, and also set some guidelines in terms of
20 timing for prefiled testimony and prefiled rebuttal in
21 the parties wish to submit that.

22 At this time does anyone have any motions
23 that they want to bring before the Commission?

24 MS. CREMER: I don't have a motion, but I do
25 have a number of questions that I need clarified.

1 It started out as an on-site review. Now
2 everyone refers to it as an audit. Will that be
3 clarified? My understanding, and I don't know that
4 much about accounting, but there's a major difference
5 between an on-site review and merely checking numbers
6 versus an audit. And I would like that clarified.

7 MR. HOSECK: Yes.

8 MS. CREMER: The other question I have is
9 will the Order spell out whether the Commission staff
10 will be allowed to hire someone to supervise the
11 whatever it is you decide to do an on-site review or
12 audit?

13 MR. HOSECK: I think that staff can
14 anticipate sufficient direction in the Order so that
15 they will know what is expected of them.

16 MS. CREMER: And the other question I have
17 to what extent is the record being reopened? And my
18 question here involves this data as I recall, and I may
19 be wrong and U S West can correct me. This is based on
20 calendar year 1995 numbers. Now, I will note that the
21 major complaints were that forecasted data was used in
22 the sale of exchanges. I'm guessing we're going to
23 have later that there may be better than forecasted
24 data out there. But I believe that really requires a
25 lot of the record. It may change a lot of it if we

1 use actual numbers, and is that what is expected?

2 MR. HOSECK: We'll take that under advisement
3 and try to address that in the Order.

4 MS. CREMER: The other question I have is
5 and I want to make sure we understand this. Staff
6 analysis has been rejected. So if I understand this
7 correctly, what staff is to do is to go out and merely
8 -- not merely, go out and verify U S West's input
9 numbers and not necessarily prove up our old numbers
10 that we used before; is that correct?

11 MR. HOSECK: Staff will be expected, I assume
12 -- and, again, this is subject to final Commission
13 action and Order -- to perform an analysis. And if
14 that includes the use of their prior numbers, then I
15 think that could probably be included in that.

16 MS. CREMER: So staff is to verify their own
17 numbers also? And before -- Commissioner
18 Schoenfelder's motion before, her motion merely went to
19 the fact that staff did not verify U S West numbers.
20 And is that what we're supposed to do?

21 MR. HOSECK: I think that that is a fair
22 assumption.

23 MS. CREMER: Okay. The other thing I have is
24 I think it was the last thing you put on your Order,
25 and I heard Mr. Riter say public interest. I have seen

1 consumer interest. And what is the term you used and
2 could you define it?

3 MR. HOSECK: Well, the last item that I
4 mentioned that the Commission is considering having
5 staff analyze is a consumer interest. And those were
6 the terms that were used.

7 MS. CREMER: Consumer interest, okay.

8 MR. HOSECK: And that's going to be decided
9 much up to the staff to decide what they want to focus
10 of how the consumer is affected. And, again, this is
11 subject to final Commission action as it would be
12 depicted in any final Order. So it's a point of
13 discussion right now. So if you have input or
14 suggestions, the Commission would be receptive to
15 them.

16 MS. CREMER: We have nothing further.

17 MR. HOSECK: Is there anything else that
18 anyone wants to bring up for purposes of this
19 prehearing conference? There being none . .

20 MR. RITER: Excuse me. Just to reiterate a
21 point I made earlier, and it's very important to our
22 people anyway, and we certainly urge you to get this
23 considered as soon as you can. And I know that's what
24 you want to do as well. But we'll do everything we can
25 I think this is true for all the intervenors. We'll do

1 everything within our power to be ready in such a
2 period of time as you schedule, and I'm sure your schedule
3 will as well. Thank you.

4 MR. HOSECK: Thank you.

5 MR. SOLOMON: Glenn Solomon again with respect.

6 MR. HOSECK: Certainly.

7 MR. SOLOMON: Based on the comments of the
8 other parties, and I believe Miss Cremer is pointing
9 out, that in order to go forward there, the staff will
10 need to hopefully hire somebody with a CPA background
11 and Telecom background, it may be worthwhile to get
12 input from that party, whoever they hire as the external
13 CPA expert, as to how long they would think the audit
14 might take. They may be the one party, just as Miss
15 Cremer and the other intervenors and U S West and the
16 other intervenors can't say how long it will take to
17 look at what the auditor will do. An auditor may be
18 able to tell you up front a better estimate.

19 And just one procedural possibility as to how
20 this could proceed and address the concerns of the
21 intervenors and the staff, an audit can be done on
22 this docket, but -- or it could also be done under the
23 general regulatory authority. And after we decide
24 that the Order of Judge Zinter could be followed with a
25 new issue of Findings of Fact setting a date today and

1 that the audit can proceed without needing to expedite
2 the audit so the auditors will not have a rushed time
3 frame in which to work. That's all AT&T has.

4 MR. HOSECK: Thank you. Anything further
5 from any of the other parties? Mr. Sahr.

6 MR. SAHR: Without belaboring the point, I
7 would agree with the last point that AT&T just made. I
8 think that essentially Judge Zinter was -- his main
9 focus was on the adequacy of the record and not
10 necessarily the findings that were ultimately reached.
11 And that it would be within Judge Zinter's Order for
12 the Commission to act quickly and really just to
13 supplement its records and its findings. And that that
14 might be a way to move the docket along and resolve
15 it. That's all.

16 MR. HOSECK: Thank you. Anything further?
17 If not, I'll turn it back to Chairman Burg.

18 CHAIRMAN BURG: No one has anything else to
19 say. I believe this concludes the prehearing
20 conference, and we will take it under advisement and
21 issue an Order clarifying the issues that were talked
22 about this morning. Thank you very much. The hearing
23 is closed.

24 (THE HEARING CONCLUDED.)
25


1 STATE OF SOUTH DAKOTA)
2 COUNTY OF HUGHES)

3
4 I, Lori J. Grode, RMR, Notary Public, do hereby
5 for the State of South Dakota, do hereby certify that
6 the above hearing, pages 1 through 30, inclusive, was
7 tape-recorded and reduced by me to typewriting.

8 I FURTHER CERTIFY that the foregoing
9 transcript of the said hearing is a true and correct
10 transcript of the tape-recording at the time and place
11 specified hereinbefore.

12 I FURTHER CERTIFY that I am not a relative or
13 employee or attorney or counsel of any of the parties,
14 nor a relative or employee of such attorney or counsel,
15 or financially interested directly or indirectly in
16 this action.

17 IN WITNESS WHEREOF, I have hereunto set my
18 hand and seal of office at Pierre, South Dakota, this
19 3rd day of July, 1997.

20
21 
22 Lori J. Grode, RMR
23
24
25

U S WEST, Inc.
1851 Cassin Street, Suite 5100
Denver, Colorado 80202
303 473-1870
FAX 303 396-7089

USWEST

William P. Heaston
Senior Attorney

RECEIVED

JUL 15 1997

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

VIA OVER NIGHT DELIVERY

July 15, 1997

Mr. William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501


**Re: In the Matter of the Establishment of Switched Access Rates for U S
WEST Communications, Inc.
Docket No. TC96-107**

Dear Mr. Bullard:

Enclosed for filing in the above-referenced docket is an original and nine (9) copies of U S WEST Communications, Inc.'s OBJECTION TO PREHEARING ORDER DATED JULY 3, 1997.

Please file stamp an extra copy of this letter, enclosed, and return to me in the enclosed self-addressed stamped envelope. Thank you.

Yours truly,


William P. Heaston

Enclosures
WPH:mob

RECEIVED

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

JUL 18 1997

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ESTABLISHMENT)
OF SWITCHED ACCESS RATES FOR)
U S WEST COMMUNICATIONS, INC.)

TC96-107

OBJECTION TO PREHEARING ORDER DATED JULY 3, 1997

On July 3, 1997, the Commission issued its prehearing order to reopen the record in this docket. Paragraph 1 of the order rejects the sworn prefiled and oral testimony of staff witnesses Rislov, Best and Knadle, which was presented in the original hearing, because the data request responses which provided information to the staff was not provided under oath, and because the responses had not been independently verified by the staff. U S WEST Communications, Inc. (U S WEST) objects to this action by the Commission for the following reasons:

1. Paragraph 1 of the order was the result of a prehearing motion by Commissioner Schoenfelder at the opening of what was noticed as a prehearing conference (notice dated June 21, 1997) which could result in an oral procedural order and "other procedural rulings and guidelines." The notice did not indicate that the Commission would be taking substantive action regarding Staff testimony in the docket. The Commission's action and order is a violation of due process as found in SDCL §§ 1-26-17, 1-26-19, 1-26-23 and 1-26-25.

2. Paragraph 1 of the order is in direct contravention to the language in Circuit Judge Zinter's oral order as found at pages 11 through 20 of the transcript of Judge Zinter's bench decision.¹ Essentially, Judge Zinter reversed and remanded the Commission's decision because U S WEST had complied with all of the accounting standards and administrative rules for completion of the cost study filed in this docket, the Commission did not accept the testimony of AT&T and the validity of its challenge to nine inputs, and the Commission had accepted, or at least not rejected, the analysis of the Commission's Staff which supported a price of \$.0615 per minute of use (Tr. 11).

As Judge Zinter went on to point out, the Commission conceded in its brief that the appropriate price for switched access ranged from \$.064 to \$.055 per minute and that the court was convinced that there is substantial evidence justifying an increase (Tr. 14, 16).² The Commission cannot, without something more in the record, arbitrarily and summarily reject the Commission Staff's evidence. The Commission has the power to obtain from U S WEST "full and complete information" but the Commission has not made such a request (Tr. 15). The remaining paragraphs of the order initiate that process. The Commission can reopen the record to take additional evidence (Tr. 16); it cannot reject the Staff's testimony and then look for evidence to

¹ U S WEST only ordered the decision portion of the transcript. It is attached to this objection as Appendix 1. Hereafter it is referred to as "Tr. 11".

support that rejection. That is the desired effect of the Commission's action in this instance.

The Commission has twisted the logic of Judge Zinter. Key to the Judge's decision is the concession by the Commission that there is substantial evidence to support a price increase to at least the \$.055 per minute level (Tr. 14, 16-17). Because of that evidence U S WEST has no additional burden to provide additional evidence on depreciation and verification of inputs. Judge Zinter was not suggesting that all the Commission had to do was enter an order rejecting the evidence in the record. What Judge Zinter expected was a reopening of the record through the exercise of the Commission's explicit powers to require the introduction of additional evidence through the use of that power (Tr. 18, 20). Then the Commission could make the appropriate findings of fact to determine the price consistent with SDCL § 49-31-12.4 (Tr. 18).

3. The reasons for the Commission's rejection of the Staff's testimony are nonsensical. Although the responses to the Staff data requests were not sworn, the Staff did review the data and compared the data with quarterly reports which the Commission receives and ARMIS reports (R. 108).³ The ARMIS reports are signed by two corporate officers; the company ledger is audited by U S WEST's external auditors; and the ledger is used to

³ Additionally, as Judge Zinter states, the Commission's counsel could not respond to a request to point to evidence which supports no increase. "R." refers to the transcript of the October 9-10, 1996, hearings in this matter.

provide inputs to the ARMIS report (R. 125). The ARMIS data is also compared to a monthly report which the Commission receives from U S WEST (Id.). The Staff did verify the inputs from the ledger and from the ARMIS reports and used other reports filed directly with the Commission. Is it the Commission's predetermination, without a scintilla of evidence, that U S WEST regularly falsifies official company records and reports which are filed with competent regulatory authority?

The staff witnesses swore to their testimony that appears in the record. No one challenged the testimony of the Staff or the credibility of the Staff or their procedures (R. 101-109, 112-127, 139-156) in this docket. The testimony of the Staff, including their review of the inputs is sworn testimony. How many oaths does it take for the Commission to believe in something?

There is no basis in fact or law to reject the Staff evidence.

4. During the prehearing conference, U S WEST objected to the motion and the decision to reject the Staff's evidence. That objection is not noted in the order. To preserve the record in this matter, U S WEST again states its objection to the Commission's action.

Accordingly, U S WEST requests that the Commission rescind Paragraph 1 of the order and reopen the record in exactly the

same status that existed before the AT&T motion was granted.

That would be consistent with the court decision (R. 19).*

Respectfully submitted this 15th day of July, 1997.

U S WEST COMMUNICATIONS, INC.

By:



William F. Heaston, Esq.
1801 California Street
Room 5100
Denver, Colorado 80202
(303) 672-2743
(303) 295-7069 Facsimile

Thomas J. Well
Boyce Murphy McDowell &
Greenfield
101 N. Phillips Ave., Ste 600
P. O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
(605) 334-0618 Facsimile

* As Judge Zinter "viewed it," his decision left the "matter before the Commission with an open docket and a motion to hear additional evidence on the five factors that are present."

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1997, an original and ten copies of the foregoing **OBJECTION TO PREPARING ORDER DATED JULY 3, 1997** was sent via over-night delivery to:

William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
State of South Dakota
500 East Capitol Avenue
Pierre SD 57501

In addition, a true and correct copy was placed in the United States Mail, postage prepaid, addressed as follows:

Donald A. Low, Esq.
Sprint Communications Company L.P.
Thompson LLP
9140 Ward Parkway - 5E
Kansas City MO 64114

David A. Gerdes
May Adam Gerdes &
503 S. Pierre St.
PO Box 160
Pierre SD 57501-0160

Brian B. Meyer
Meyer & Rogers
PO Box 89
Onida SD 57564-0089

Robert G. Marmet
PO Box 269
Centerville SD 57014

John S. Lovald
Olinger Lovald Robbennolt
& McCahren PC
117 E. Capitol
PO Box 66
Pierre SD 57501

Robert C. Riter, Jr.
Riter Mayer Hofer Waller
& Brown
319 S. Coteau
PO Box 280
Pierre SD 57501-0280

Mary Tribby, Esq.
AT&T Law Department
1875 Lawrence St.
Denver CO 80202

Karen Cremer
Counsel for Staff
500 E. Capitol
Pierre SD 57501

Thomas J. Welk
Boyce Murphy McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

U S WEST Communications, Inc.

THE COURT: Okay. Well, since -- because of the continuation of this case, I've had two opportunities to prepare. I'm going to give you a bench decision.

The matter before the Court is an appeal by US West from a Commission decision including Findings of Fact and Conclusions of Law which granted AT&T's motion to disapprove the rate increase and close the docket, which is essentially a motion to dismiss. The effect of that ruling was to deny US West any increase in its switched access rates.

I think some historical recitation should be in the record on my part at this point. On June 24, 1996, US West filed for the approval to increase the rates. The Commission permitted intervention by numerous parties who have been -- who are all here and represented in court today. Maybe -- well, Dakota Cooperative may not be, are they?

MR. WELK: They're not here, your Honor.

THE COURT: Yeah. With their exception -- and Express is not here.

MR. WELK: They withdrew, your Honor.

THE COURT: Okay. With those exceptions, the other parties have argued today.

Now, historically, it appears that under the statute 12.4, the Commission suspended the proposed rate increase

Now, this appeal, as I see it, involves the question of whether the Commission properly or improperly granted the motion to disapprove and close the docket or dismiss without determining a fair and reasonable rate based on

At the outset, there's a dispute among the parties about the correct standard of review. One side argues that -- or the Intervenor primarily argue that this is a question of fact or mixed question of fact governed by the clearly erroneous standard. US West argues that it's a mixed question of fact and law that is based -- or that's really a de novo review because the historical facts are undisputed and the Commission's determination was to determine the legal effect of the evidence.

This Court concludes that ultimately, the FCC decision to determine a fair and reasonable rate is a factual determination, which is within the expertise and experience of the Commission, and consequently, is a factual review or matter which should be governed by the clearly erroneous standard.

Now, getting to the law that applies, SDCI 49-31-11-1 governs the proceedings before the Commission.

Subdivision 1 of that statute provides that the Commission may upon a petition enter into a hearing concerning the propriety or reasonableness of the proposed increase.

Subsection 3 provides that during that hearing the Commission may receive, "whatever evidence, statements, or arguments the parties may offer pertinent to the investigation." Although, the burden is clearly on the company to prove that the imposed rate is fair and reasonable.

Subsection 4 specifically provides that after the hearing, the Commission has a duty to, "determine a fair and reasonable rate, render a written decision specifically setting out the rate or price and prepare a record of its proceedings."

If a company exercises its statutory right to implement a rate, subsection 5 then provides that upon completion of the hearings and entry of a Commission decision, the Commission may require that the company refund with interest the portion of the "increased rates" found to be fair -- excuse me -- unfair or unreasonable.

Now, in determining -- in making these determinations, the Commission has adopted a computer model to assist in determining what is a fair and reasonable rate. These rules dictate the methodology by which the rates are to be determined. US West's cost study utilized that model. It suggested a 6.4 cents per minute rate.

The PUC staff took issue with, as I read it,

Now, historically, it appears that under the 1960
12.4, the Commission suspended the proposed rate increase.

1 and scheduled a hearing for October 9 and 10. After that
2 hearing and after the Commission heard the evidence, the
3 Commission moved to reopen the record to take additional
4 evidence. Thereafter, US West advised the Commission that
5 it believed the existing administrative record supported
6 its application and that it did not intend to offer
7 additional evidence.

8 At approximately the same time, US West advised the
9 Commission that because of -- that because the hearing on
10 the Commission's motion to reopen would not take place
11 until after the expiration of the statutory 180-day time
12 period, US West was going to exercise its statutory right
13 to unilaterally impose the proposed change. That right is
14 set forth in 49-31-12.4(5).

15 The next thing that occurred is on January 16, 1997,
16 before the scheduled rate -- or excuse me, before the
17 scheduled date of hearing to take the additional evidence,
18 AT&T moved to disapprove the application and close the
19 docket. After a further hearing, AT&T's motion was
20 granted and the Commission entered Findings of Fact and
21 Conclusions of Law, which are the subject of this appeal.

22 Now, this appeal, as I see it, involves the question
23 of whether the Commission properly or improperly granted
24 the motion to disapprove and close the docket or dismiss
25 without determining a fair and reasonable rate based on

1 the evidence in the record. The issue is whether or not
2 there is substantial evidence in the record to support the
3 Commission's ultimate decision that US West was not
4 entitled to any increase because that's the effect of what
5 occurred by granting the motion to dismiss.

6 At the outset, there's a dispute among the parties
7 about the correct standard of review. One side argues
8 that -- or the Intervenor primarily argue that this is a
9 question of fact or mixed question of fact governed by the
10 clearly erroneous standard. US West argues that it's a
11 mixed question of fact and law that is based -- or that's
12 really a de novo review because the historical facts are
13 undisputed and the Commission's determination was to
14 determine the legal effect of the evidence.

15 This Court concludes that ultimately, the PUC
16 decision to determine a fair and reasonable rate is a
17 factual determination, which is within the expertise and
18 experience of the Commission, and consequently, is a
19 factual review or matter which should be governed by the
20 clearly erroneous standard.

21 Now, getting to the law that applies, SDCL 41-31-12.4
22 governs the proceedings before the Commission.
23 Subdivision 1 of that statute provides that the Commission
24 may upon a petition enter into a hearing concerning the
25 propriety or reasonableness of the proposed increase.

1 Subsection 3 provides that during that hearing the
2 Commission may receive, "whatever evidence, statements, or
3 arguments the parties may offer pertinent to the
4 investigation." Although, the burden is clearly on the
5 company to prove that the imposed rate is fair and
6 reasonable.

7 Subsection 4 specifically provides that after the
8 hearing, the Commission has a duty to, "determine a fair
9 and reasonable rate, render a written decision
10 specifically setting out the rate or price and prepare a
11 record of its proceedings."

12 If a company exercises its statutory right to
13 implement a rate, subsection 5 then provides that upon
14 completion of the hearings and entry of a Commission
15 decision, the Commission may require that the company
16 refund with interest the portion of the "increased rates"
17 found to be fair -- excuse me -- unfair or unreasonable.

18 Now, in determining -- in making these
19 determinations, the Commission has adopted a computer
20 model to assist in determining what is a fair and
21 reasonable rate. These rules dictate the methodology by
22 which the rates are to be determined. US West's cost
23 study utilized that model. It suggested a 6.4 cents per
24 minute rate.

25 The PUC staff took issue with, as I read it,

1 approximately nine of the inputs used by US West in that
2 model. Nevertheless, the PUC's own staff made adjustments
3 itself and determined and testified essentially that a
4 fair and reasonable rate was the 6.15 rate. In addition,
5 the evidence in the record reflects that the other people
6 that have these -- or other companies in South Dakota that
7 have these rates have established rates -- access rates it
8 looks to me like ranging between 7.04 cents going all the
9 way up the ladder to there's some -- a couple 8's, a 9 and
10 even a 10 cent rate.

11 Now, the Intervenor objected to US West's proposal
12 and inputs. They did not submit quantifiable evidence
13 concerning what a fair and reasonable rate was. Instead,
14 the intervenors criticized various rates and inputs --
15 various inputs. I should say, that were used by US West in
16 the computer model. US West then came back in their
17 rebuttal case and although they didn't agree with those
18 critics, they demonstrated that if the criticisms were
19 valid -- and that is the criticisms of the inputs -- that
20 the rate, even assuming those criticisms to be valid,
21 would be 5.55 percent -- 5.55 cents, excuse me.

22 Now, at the hearing, US West agreed to the staff
23 recommendation of 6.15. They did not agree to the 5.55 at
24 the hearing, but they have agreed to that before the Court
25 today and asked the Court to set the rate at 5.55.

1 In analyzing this case, the Court must take into
2 consideration the fact that a majority of the Commission
3 determined that they were uncomfortable essentially with
4 two things. And because of that, they moved to reopen the
5 record to take additional evidence. As I read the record,
6 there were five concerns of the majority. Those concerns,
7 however, really fall into two groups.

8 Essentially, the first group is that the Commission
9 was uncomfortable with the reliability of the inputs used
10 by US West in the computer model. The second group of
11 concerns was that the majority of the Commission was
12 concerned about the effect that the rate increase on small
13 resellers might have. The Commission, however, never
14 pursued either of those concerns because it granted AT&T's
15 motion to disapprove the application and close the docket.

16 Now, as I've indicated before, that means the issue
17 before this Court is the propriety of granting that
18 motion. The Commission has entered extensive findings and
19 conclusions to support its decision, but I think when you
20 look at it, it really comes down to two reasons in those
21 findings why they granted the motion.

22 First, the Commission found that US West's proposed
23 switched access rates were not in the public interest.
24 That finding was made in Finding of Fact XXIII. The
25 second reason is set forth in Findings XXIV, XXV, and

1 XXVI. There, the Commission found that US West's inputs
2 into the cost study were not adequately verified and as a
3 result, the computer model -- let me try to -- could have
4 produced an incorrect mathematical result.

5 In the process of doing that, they also found that US
6 West's witness -- prime witness on this issue, Mr. Culp,
7 was not credible. Ultimately, then the Commission found
8 that US West had not met its burden of proof that a 6.15
9 percent -- cent rate was fair and reasonable. However,
10 the Commission did not determine a fair and reasonable
11 rate or render a decision specifically setting out the
12 rate. Rather, it simply granted the motion to dismiss
13 before the implementation date of US West's proposal.

14 This Court, after considering the record and
15 evidence, believes that the matter must be remanded for a
16 number of reasons. First, the Commission's Findings of
17 Fact that US West's proposed access rates are not in the
18 public interest is not supported by any Findings of Fact
19 to indicate how that ultimate finding was made as is
20 required by In Re SDDS. Now, the Commission and the
21 Intervenor's in their briefs point out various theories
22 upon which a public interest finding could be sustained.
23 However, under SDDS, this Court may not search the
24 record and speculate whether these various theories are
25 the ones which support that finding.

More specifically, there's been argument to the Court that the impact on the other retailers, the other purchasers, sustain a public interest finding. There's the arguments about rate shock and that is mentioned in the Commission decision. However, in the ultimate finding, they simply conclude -- or the Commission simply concludes that it's not in the best interests, but they don't indicate what the underlying findings are to support that finding -- that ultimate finding.

And as a consequence, if nothing else, the case has to be remanded for the Commission to indicate the findings that it believes makes no rate increase in the public interest. ADDS requires that the Commission must reflect the actual reasons for that ultimate finding. In the absence of the underlying findings, this Court is left to speculate if those are the sole reasons or if they are the reasons for the Commission's ultimate finding. So on remand on that issue, the Commission must articulate the underlying factual reasons for its public interest finding.

Now, in doing so, this Court wants to note that I am not deciding today whether or not the public interest is a factor which the Commission may, as a matter of law, consider. Because the matter is being remanded, that issue may be further considered on further appeal once an

adequate factual record is established so this Court can adequately review it.

The matter must also be remanded because of the way the Commission disposed of the arguments concerning the accuracy and reliability of US West's inputs. At the outset, it should be noted that there's no issue that US West complied with all accounting standards and administrative rules for completion of the cost study that were in existence at the time of the hearing. Although the Intervenor and Commission members were concerned about the accuracy and reliability of the inputs, the unrefuted rebuttal testimony reflected that if all those criticisms were considered, US West was still entitled to a 5.55 cent rate.

More importantly, although two of the commissioners had concerns about the reliability and accuracy of the inputs, the Commission did not find that any of the nine inputs at issue -- I should say any of the specific inputs at issue were unreliable. And very significantly, the Commission did not find that the -- any of the inputs -- and I should say the corrected inputs or adjusted inputs used by its own staff analysts were flawed, were inaccurate or were unreliable.

It's true that they did express concern about some of the underlying data not being under oath, but there's no

1 finding rejecting the testimony of Knadle, Best, or
2 Rislov's analysis. And I think it's important to indicate
3 here what that testimony is. The Court has read the
4 proceedings before the Commission and I note that -- I
5 hope I'm pronouncing this right, is it Knadle?

6 MR. ROSECK: Yes.

7 THE COURT: Mr. Knadle, a utility analyst for the
8 Commission staff, testified about the appropriate rate.
9 There were three of them that did. They did this as a
10 joint project and all agreed that this 6.15 was an
11 appropriate rate.

12 Now, more specifically, Knadle testified as to some
13 of the inputs. I forget, but one of them had four and one
14 of them had five and then one of them kind of summarized
15 it. But Knadle was specifically asked whether he had
16 considered the cross-examination of Culp and the testimony
17 of Parker, which was the witness who criticized US West's
18 inputs, and he did not change his pre-filed testimony in
19 spite of AT&T's cross-examination of Culp and the
20 testimony of Parker.

21 It's also significant to note that he considered not
22 only the cost study provided by US West, but other
23 information that he felt necessary to feel comfortable
24 with a fair and reasonable rate that he obtained from US
25 West. The bottom line is that he did not testify that the

underlying information was inadequate.

So also, Harlan Best, another analyst with the staff, testified as to five of the other -- five other considerations that -- or adjustments that the Commission staff was concerned about. In his testimony before the Commission he adopted his pre-filed testimony, which essentially indicated that the cost study as adjusted complied with the Commission rules and at 6.15 cents was appropriate. Although there's an argument about whether the underlying information was under oath and whether it's secondary information or whatever, he testified that he relied on the ARMIS report, that he used the monthly reports that US West is required to file, and that even though he considered Culp and Parker's testimony, that did not change his recommendation.

Finally, Greg Rislov, another analyst with the Commission, testified as to four other adjustments and issues that were in dispute. And despite the Parker testimony, which he had read, he adopted his pre-filed testimony and -- which essentially in consultation with the other two, recommended a 6.15 cent rate.

So what you have here is a record wherein these -- this evidence presented by these three analysts is not rejected by the Commission. Nevertheless, US West -- or excuse me, the Commission today argues to this Court in

its briefs that there is an evidentiary shadow on the cost study because of the cross-examination of Culp and the other criticisms of the inputs raised by AT&T.

However, I think it's extremely significant that the Commission essentially admits in its brief or concedes that, "Depending on what cost study or whose analysis it -- meaning the PUC -- would believe, the switched access rate ranged from 6.4 cents per minute to 5.55 cents per minute." That's PUC Brief at pages 10 through 11.

This admission clearly demonstrates to this Court that there is the existence of a range of substantial evidence justifying some increase. The Commission, however, in granting what's equivalent to a motion to dismiss, in my opinion, failed to follow its statutory duty to "determine a fair and reasonable rate or price, render a written decision specifically setting out the rate and prepare a record of its proceedings."

This Court acknowledges that the motion was granted because US West indicated that it would not present any additional evidence to support its application in the hearings. However, that application -- or that action of US West did not relieve the Commission of its responsibility to determine a fair and reasonable rate. That duty arises not only from section 12.4, but also from the general powers and duties of the Commission under

1 section 7.1.

2 Under that statute, the Commission is given explicit
3 power to obtain from US West "full and complete
4 information necessary to enable it to form the duties and
5 carry out the objects for which the Commission was
6 created." The Commission also has explicit authority to
7 require reports which, in the opinion of the Commission,
8 it finds necessary or proper for its information. The
9 Commission may prescribe the forms of any and all
10 accounts, records, and memoranda to be kept by US West.
11 And they specifically may inspect all accounts, records
12 and memoranda kept by US West.

13 Moreover, the Commission may employ special agents or
14 examiners to examine any and all accounts, records and
15 memoranda used by US West including the right to examine
16 books, papers, documents and employees of the company.
17 Finally, the Commission is given specific subpoena power
18 to compel the attendance and testimony of witnesses and
19 the production of books, papers, tariffs and documents
20 relating to any matter under investigation.

21 It's evident on reading this record that the
22 Commission staff requested the information it deemed
23 necessary to determine a fair and appropriate rate. The
24 Commission, however, did not. Rather, it simply dismissed
25 the docket -- or the application. It did so because the

Commission's findings reveal, at least in my opinion, a potential problem with the inputs used by US West and its own staff witnesses.

Again, however, the Commission did not find that its own staff's witnesses were unreliable, unbelievable or not credible. And in the absence of such a finding, the only "substantial evidence" on this record supports some kind of an increase, using the Commission's own words to this Court, "Depending on what cost study or whose analysis the PUC would believe, the switched access rate ranged from 6.4 cents per minute to 5.55 cents per minute."

This shows to this Court that there is substantial evidence to support some rate increase. However, I've repeatedly asked today what evidence there is to -- what substantial evidence there is to purport -- to support an increase and no one has been able to identify any such evidence to this Court. Now, the Commission and Intervenor's further argue that further hearings were useless because US West did not intend to introduce further evidence. Again, I believe this overlooks the Commission's statutory duties and responsibilities. Under those duties and responsibilities, the Commission certainly had the authority to reopen this record as it did to satisfy itself on the five concerns expressed at the December 9 meeting.

1 My decision is not intended to imply that the
2 Commission, if not satisfied with numbers, cannot inquire
3 into those matters. They clearly have that power.
4 However, the five concerns that were -- that are in this
5 record are number one, whether the depreciation was
6 inadequately explained and unresolved; number two, whether
7 there was a lack of quantification by small resellers of
8 the effect of the proposed rate increase on their
9 membership; number three, whether small resellers had
10 presented sufficient alternatives to the cost model
11 results; number four, what the effect of the size of the
12 rate increase on small resellers would be; and five, a
13 concern over the lack of verification of numbers which
14 went into the cost model.

15 I think, however, -- at least in my opinion, however,
16 it's -- it was not useless to proceed for two reasons.
17 First, as I previously indicated, in the absence of a
18 finding by the Commission that its own staff witnesses are
19 not credible, are unreliable and that their testimony is
20 totally rejected, I don't believe US West was obligated to
21 provide additional evidence on concerns one and five. At
22 that point, the record, in the absence of a finding or a
23 rejection of their testimony, there was evidence in the
24 record as the Commission's brief to this Court concedes,
25 because there was a range of evidence before the

Commission.

If the Commission is uncomfortable with the inputs on concerns one and five, as I've previously indicated, it has more than adequate authority to obtain that information from US West. If the Commission on remand believes that US West's numbers really need what's been described as scrubbing, the Commission has the authority to accomplish that task. And as I've already indicated two or three times, in the absence of a finding that the PUC staff testimony is rejected, the Commission has a duty then under 12.4 to determine the appropriate rate that's based on the evidence in the record.

The second error on this issue of reopening the record because of these concerns is that the other concern on factors two, three and four really weren't US West's obligation to satisfy. Under those concerns, those were concerns about the resellers' failure to present evidence. And there may be rate shock and public interest matters to be considered here, but under the Commission's own order to reopen -- or the motion to reopen, the Commission's dismissal of the docket was not warranted by the failure to produce evidence on factors two, three and four. That wasn't US West's obligation. That was the obligation of the others. Findings of Fact -- or Finding of Fact XXVIII clearly reveals that these issues involved evidence which

1 only the Intervenor could produce and US West simply need
2 not be faulted or penalized for failure to produce
3 evidence on those issues.

4 So for all these reasons, I'm going to conclude that
5 the granting of AT&T's motion of disapproval was in error. *
6 As I view it, that leaves this matter before the
7 Commission with an open docket and a motion to hear
8 additional evidence on the five factors that are present.

9 It will be the order of the Court that the matter be
10 remanded to the Commission for further proceedings not
11 inconsistent with this opinion. The matter is remanded
12 with the express opportunity of the Commission to conduct
13 its investigation as it deems appropriate under its motion
14 to reopen the record and -- but ultimately, the matter is
15 remanded to the Commission to carry out its statutory duty
16 to "determine a fair and reasonable rate, render a written
17 decision specifically setting out the rate, and prepare a
18 record of its proceedings."

19 Mr. Welk, you should prepare an order of remand
20 consistent with this -- maybe it would just be easier to
21 incorporate this decision.

22 MR. WELK: May I ask some questions, your Honor,
23 about what your remand order means because we're just
24 going to be back arguing this again.

25 THE COURT: Well, what I've tried to say is, as I

1 view it, the issue before the Court today is whether or
2 not the motion to dismiss -- the motion to disapprove and
3 close the docket was inappropriate. I think it was. The
4 Findings of Fact and Conclusions of Law don't support it
5 for the reasons I've indicated. And I think if the
6 Commission -- I think if the Commission is genuinely
7 concerned about the numbers and it wants to scrub numbers,
8 it's got the power to do that and it should do that
9 because that's its duty and obligation under the statute.
10 And I also think that if you want to implement your rate
11 you can implement your rate. It seems to me that's where
12 we're back to when the -- when the motion to disapprove is
13 overruled.

14 MR. WELK: Well, my questions, your Honor, go to does
15 this give the Commission the opportunity to go over all of
16 the evidence that has been presented or is it that the
17 hearing that may be held limited in scope to what the
18 concerns were at the time that the motion to reopen, which
19 you've already gone through and talked about? What is the
20 scope of the remand hearing going to be, and what are we
21 going to do at the hearing to implement your order?

22 THE COURT: Mr. Welk, I can't give you an answer to
23 that. I think this is an -- the Commission is empowered
24 to make these decisions. They made -- they moved to
25 reopen the record. I think if they're uncomfortable with

1 the numbers, they've got that right. And I understand
2 your concern, but I don't think I -- I don't think it's a
3 judicial function to tell the Commission on remand how to
4 conduct its business.

5 MR. WELK: Can we at least, your Honor, have the
6 order for remand dictate when this matter ought to be
7 concluded in light of the fact that this matter has been
8 over one year since the application has been filed.

9 MR. HOSECK: May I speak to that, your Honor?

10 THE COURT: Yes, Mr. Hoseck.

11 MR. HOSECK: In doing that, and if the Court does
12 that, the thing that I would ask is that if the Commission
13 on remand goes for a scrubbing of these numbers, this may
14 be a time consuming process.

15 Now, I don't think that anybody can say that this has
16 been unduly delayed in those processes, but I think that
17 there's a practical consideration here that if the
18 Commission orders an audit or some sort of verification,
19 whether by its own staff or whether it requests this
20 information of US West, that this is going to take some
21 time. That's the only point I'd like to make.

22 THE COURT: Well, I don't -- I understand your
23 concern, Mr. Welk, but I don't believe that I have
24 authority to tell the Commission to act within a certain
25 number of days. I mean, I would obviously encourage them

1 to act as reasonably quickly as they can. I don't know
2 what they're going to do. And as I've indicated, I think
3 they've got the right to further investigate this.

4 The other side of the coin is, you know, US West,
5 everybody in this room, I think are big -- well, maybe not
6 big companies, but you've got the right to implement the
7 rate and at least, you know, that's -- maybe that's an
8 advisory opinion, maybe that's subject to argument. I
9 don't know. And if it is, I don't mean to express an
10 opinion today that that is the law, but in just reading
11 the statute it seems like that's what everyone here today
12 kind of agreed. But you've got the right to implement the
13 rate, but they should act, I mean, forthwith. That --

14 MR. WBLR: I would just like some direction, your
15 Honor, in light of what has happened here because we're
16 going to get into the issues, I'm telling you right now,
17 we already started doing this in the last hearing about
18 who's going to pay for this. The staff is satisfied. You
19 know, apparently they were at the hearing. So whatever
20 the Commission wants to order, whose going to pay for it.
21 The rest of these people, we're going to go back and we're
22 going to discuss. But I at least want some direction that
23 the Court has said act, you know, forthwith to get this
24 matter done. I think I'm entitled to that for my client.

25 THE COURT: Forthwith. How's forthwith?

Anything else?

Okay. We'll be in recess.

MR. RITER: Thank you, your Honor.

MR. ROSECK: Thank you.

(Conclusion of Hearing.)